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### TRUST COMPANIES AS EXECUTORS AND GUARDIANS.

It becomes a duty at times, from which we never desire to shrink to warn the profession of tendencies which threaten either its existence, its high standing, or its pecuniary emoluments. In this particular instance we desire to call attention to the gradual usurpation on the part of what are known as trust companies of certain kinds of probate business formerly in the hands of lawyers exclusively.

There is no avenue of professional activity more lucrative than that relating to the administration of estates. But corporations, sailing under the name of "trust companies," are encroaching very materially upon these valuable sources of professional income against the course of the common law and the early decisions of the courts resisting their first advances. We desire to be fair to the trust companies as we recognize much that is praiseworthy in them, but we cannot but believe that there is a determined purpose on their part to alienate the lawyer completely from certain important departments of legal practice hitherto enjoyed by him and that without advantage to anyone concerned. With what insidious wiles and assurances to the profession these companies have thought to appease the rising tide of opposition against them. But lawyers all over the country have generously heeded the loud protests of the trust companies that attorneys of deceased persons and of their relatives whose estates come into their hands would be retained by them. The result has been that vast estates have come into the hands of these corporations, who, instead of employing the personal attorneys of the deceased's family, transact the business of the estate through hired clerks whom they employ at the rate of twenty-five dollars a week, and for this service collect the enormous percentage fees allowed to executors and administrators under the laws in force in most of the states. This constitutes the indictment against the trust company.

The lawyer, however, is the most liberal and generous of all professional men. He never

thinks of protecting the emoluments of his profession from the attack of any innovation if the new order of things will benefit the people or the nation at large. Witness for instance the attitude of the profession toward the adoption of the Torrens System of Land Registration, which if in full force would cut off completely that lucrative department of a lawyer's practice, known as abstracting. Not only are lawyers not opposing this innovation, but successive bar associations are constantly calling upon their respective legislatures to appoint commissions to consider the new system. And such was the attitude of the profession toward the encroachments of the trust companies. The feeling was that there may be some pre-eminent advantage in having a trust company act as executor or guardian which, from a professional standpoint, would be sufficient to justify the curtailment of another source of professional income.

Has this innovation shown any such pre-eminent advantages? On the other hand certain features of it are certainly very disappointing. When, for instance, in the case of a large estate, the large amount of the administrator's fee goes to a stranger instead of some member of the deceased's family, and the legal matters connected with the estate, for which this exorbitant fee is paid are, as a general rule, looked after by mere clerks in no wise interested in the family of the deceased, and where the family, if hard pressed during the period of administration, must comply with every technicality of the law before they can obtain an allowance, the disadvantage and loss to the estate and the deceased's family are very evident. Take an actual case which came under the writer's observation recently. A man having about one hundred thousand dollars in bonds, consulted an attorney about making a certain trust company his executor. The attorney advised him not to do it, but to name his widow executrix without bond and permit her to employ a competent attorney. He did so. The man died and his estate was administered by his widow, under the advice of an attorney. The first advantage that appeared was the use, from time to time, of as much money of the estate as the widow pleased without the annoyance and delay of obtaining an order of court. Many similar ad-

vantages, which will readily recur to one who considers the situation, were also enjoyed. All of this, of course, was with the consent of the heirs. Nevertheless, it is very apparent that with a stranger or trust company as executor under bond, these advantages would not have been possible. Moreover, the widow avoided an expense of five thousand dollars which would have gone to the trust company as its commissions and paid five hundred dollars to a competent attorney for advice and services during the administration of the estate, in the meanwhile being free to invest, sell or reinvest the assets of the estate at will. Of course this was an estate in which everything was amicably adjusted, but it is not difficult to follow out the same argument to some extent at least, under other and perhaps less favorable circumstances.

The state of the law on this subject is interesting. Blackstone says that at common law no corporation could "be executor or administrator, or perform any personal duties, for it cannot take an oath for the due execution of the office." 1 Black. Comm. 477. Williams adds another reason for their incompetency, "principally because they cannot prove a will." Williams, Ex. p. 170. Other authorities holding that a corporation cannot act as executor of an estate or guardian of a minor may be mentioned as follows: *De Mazar v. Pybus*, 4 Ves. Jr. 644; *Goods of Fernie*, 6 Notes of Cas. 657; *Georgetown College v. Browne*, 34 Md. 450; *Thompson's Estate*, 33 Barb. 334. Schouler says: "Whether a corporation aggregate can be executor has long been doubted. In some parts of the United States this point is decided adversely as to aggregate corporations in general; though companies may now be found whose charters expressly permit the exercise of such functions in connection with the care and investment of trust funds. Modern English practice recognizes the right of a corporation unsuitable for the trust, which is named executor, to nominate persons who may execute the trust in its stead." Schouler, Ex. § 32. In the latest case in England the court ordered the general manager of a trust company, chartered to act as executor, etc., which had been named as executor in a will, to be appointed administrator cum testamento annexo with the trust company as surety, thus preserving

the personal aspect of this relation. *In re Goods of Hunt*, L. R. (1896) P. D. 288. It is certain, therefore, that a corporation cannot be named executor at all, unless the right to administer is expressly granted in the charter. *Thompson's Estate*, 33 Barb. (N. Y.) 334; *Georgetown College v. Browne*, 34 Md. 450. And it has been held in New York that a trust company or other corporation though expressly empowered to administer, may not be appointed on the request of those entitled to administer so as to take priority even of a public administrator.

It is very evident that the trust company's right at law to act as executor or administrator exists by the merest sufferance. As a corporation, it has no such power, and only the express provision in its charter to that effect permits it to act as executor or guardian. This is not so in the case of ordinary trusts, as it has been held by recent decisions that any corporation may hold money or property to the use of another. Nor is there any practical objection to a corporation acting as trustee. Indeed, there are many advantageous features connected with a trust company's handling of such business. In the first place it has almost perpetual existence, and, in the second place it has capable accountants, so that in the case of charitable trusts running far into the future or spendthrift trusts or trusts of any kind which are to exist for life or for a long term of years or which require much book-keeping and are complicated in their nature, a trust company furnishes the best possible medium for administering the trust, and a lawyer will do well always to advise the placing of such a trust in the hands of a trust company.

But these considerations do not apply to the more personal relations of executors, administrators and guardians. While these are also in their nature trust relations, there is also a personal aspect that cannot be avoided. The executor stands in the place of the decedent toward the rest of the family during the interim of administration. During this period the property of the estate and possibly the entire income of a family is tied up in his hands as an officer of the court. If the executor, who thus becomes a member of the family during the period of administration, is a stranger, or worse still, a corporation whose officers must naturally insist on every

legal technicality in the administration of the funds of the estate, the situation of the remaining members of the family dependent upon the stranger or corporation for their very existence oftens becomes very awkward and embarrassing to say the least. With the widow or some other member of the family acting as executrix or administratrix without bond, these and many other disagreeable and expensive features of the administration of estates by strangers or trust companies are avoided and the family affairs move on after the death of the decedent without interruption or annoyance.

Our conclusion is therefore that the profession should as often as opportunity presents, enlighten the public mind on the disadvantages and embarrassments that arise when trust companies are appointed to act as executors or guardians. Whether it would be wise to seek legislative interference in this regard, as some attorneys have suggested, is to be gravely doubted. The motives of the profession would certainly be misconstrued and misunderstood. But it is certainly advisable, also, in drawing a will for a client, to point out the respective advantages of having a trust company to administer any trust which the testator may create by his will as well as that of having the widow or some other member of the family appointed to carry the estate through the period of administration. Constant and united action of the bar in this direction will result in a fair division of what is known as probate or surrogate business between trust companies and attorneys with advantage alike to the public and the profession.

#### NOTES OF IMPORTANT DECISIONS.

**CONSTITUTIONAL LAW — RIGHT TO COMPEL PARENT TO FURNISH MEDICAL ATTENDANCE TO HIS SICK CHILD.**—Can a parent be compelled to furnish medical aid to his sick child? The state of New York has emphatically answered the question thus propounded in the affirmative. Sec. 288 of the Penal Code of that state provides as follows: "A person who willfully omits, without lawful excuse, to perform a duty, by law imposed upon him, to furnish food, clothing, shelter or medical attendance to a minor, \* \* \* or neglects, refuses or omits to comply with any provisions of this section, \* \* \* is guilty of a misdemeanor."

This statute, as might easily be inferred, was directed principally at the cult which styles itself Christian Scientists, and it is from this source

we would expect the first voice of protest to be heard. This expectation is realized in the recent case of *People v. Pierson* (N. Y.), 68 N. E. Rep. 243.

The indictment in this case accused the defendant of the crime of violating section 288 of the Penal Code in that he "did willfully, maliciously and unlawfully omit, without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his said (J. Luther Pierson's) female minor child, under the age of two years, the said minor being then and there ill and suffering from catarrhal pneumonia, and he, the said J. Luther Pierson, then and there willfully, maliciously and unlawfully neglecting and refusing to allow said minor to be attended and prescribed for by a regularly licensed and practicing physician and surgeon, contrary to the form of the statute in such case made and provided."

We will not set out here the argument of the court as to what constitutes "medical attendance." Suffice it to say that the decision holds that the term "medical attendance," as used in the act, means attendance by a physician regularly licensed, and does not include such attendance by a person who, because of his religious belief, neglects to furnish proper medical attendance to a minor, relying on prayer for Divine aid.

On the further and probably more important question as to the constitutionality of the act itself, as thus construed, the court said: "The remaining question which we deem it necessary to consider is the claim that the provisions of the Code are violative of the provisions of the Constitution, Art. 1, Sec. 3, which provides that 'the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to exclude acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.' The peace and safety of the state involve the protection of the lives and health of its children, as well as the obedience to its laws. Full and free enjoyment of religious profession and worship is guaranteed, but acts which are not worship are not. A person cannot, under the guise of religious belief, practice polygamy, and still be protected from our statutes constituting the crime of bigamy. He cannot, under the belief or profession of belief that he should be relieved from the care of children, be excused from punishment for slaying those who have been born to him. Children, when born into the world, are utterly helpless, having neither the power to care for, protect or maintain themselves. They are exposed to all the ills to which flesh is heir, and require careful nursing, and at times, when danger is present, the help of an experienced physician. But the law of nature, as well as the common law, devolves upon the parents the duty

of caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance and preservation, including medical attendance, if necessary; and an omission to do this is a public wrong, which the state, under its police powers, may prevent. The legislature is the sovereign power of the state. It may enact laws for the maintenance of order by prescribing a punishment for those who transgress. While it has no power to deprive persons of life, liberty or property without due process of law, it may, in case of the commission of acts which are public wrongs or which are destructive of private rights, specify that for which the punishment shall be death, imprisonment, or the forfeiture of property. *Barker v. People*, 3 Cow. 686-704, 15 Am. Dec. 322; *Lawton v. Steele*, 119 N. Y. 226-236, 23 N. E. Rep. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813; *Thurlow v. Massachusetts*, 5 How. 504-563, 12 L. Ed. 256."

For a full and interesting discussion of the liability of a parent at common law on charge of manslaughter, for negligently omitting to furnish medical attendance to child because of religious disbelief in the efficacy of medicine, see 55 Cent. L. J. 44.

#### FOREIGN RECEIVERS: THEIR DUTIES, POWERS AND LIABILITIES.

*The Nature of the Office of a Receiver.*—A receiver is an officer of the court appointing him, "the hand of the court," it has been said, and the property in his possession is *in custodia legis*. An officer of the court, he is, in another sense, the agent, not of one of the parties alone, but the impartial representative of all who are interested in the administration of the estate that he possesses and the funds that he holds.<sup>1</sup>

*Jurisdiction to Appoint.*—The appointment of a receiver is inherently of equitable cognizance, and a remedy originated in the English Court of Chancery to supply the suitor with a means to enforce his rights in cases wherein the common law remedy was inadequate to accomplish justice between the parties.<sup>2</sup> By statute, however, the same power has in most of the states been conferred upon courts of law; and the powers of courts of equity in this regard have been universally extended and enlarged. A proceeding for the appointment of a receiver is in the nature of an action *in rem*, and authority

to appoint a receiver extends to all property within the territorial jurisdiction of a court;<sup>3</sup> but a court cannot invest its receiver with an absolute control or authority over property beyond its jurisdiction, even if the order of appointment in terms purport to do so.<sup>4</sup> But jurisdiction is not conditioned entirely upon property of the debtor's being within the jurisdiction of the court whose power to appoint a receiver is invoked. And it has been held that a court of the state in which a corporation is organized may appoint a receiver of its property and affairs, notwithstanding that all of its property, both real and personal, is situated in another state.<sup>5</sup> Such an appointment, however, confers no legal authority that the receiver can exert over the property, without the aid of the courts in whose jurisdiction it is found. As was said in *Catlin v. Wilcox Silver Plate Co.*:<sup>6</sup> "The appointment, of its own force, gives him the right to take possession of the property; but it confers upon him no power to compel the recognition of that right outside the jurisdiction of the court making the appointment."

*The Nature of the Title of a Receiver.*—The title of a receiver, like the title of any other person, to be exactly determined, must, of course, be traceable to its source. The title of a receiver to foreign property may flow from an order made in a proceeding wholly *in invitum* appointing him receiver with title to the property of the debtor co-equal with the debtor's own. So, the receiver's title may be aided by a compulsory assignment from the debtor, or his title may be traceable to an assignment purely voluntary, and of the nature of an assignment at common law. Between the first two, there is no distinction in fact; but either, according to the weight, but not to the unanimity, of modern authority confers such authority over the property as that the receiver may deal

<sup>3</sup> *Hellebush v. Blake*, 119 Ind. 350; *Hutchinson v. American Palace Car Co.*, 104 Fed. Rep. 350.

<sup>4</sup> *Wyman v. Eaton*, 107 Iowa, 214, 77 N. W. Rep. 865; *Booth v. Clark*, 17 Howard 322; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 24 N. E. Rep. 250; *Zacher v. Fidelity, etc., Co.*, 106 Fed. Rep. 593, 45 C. C. A. 480; *Commercial Nat. Bank v. Matherwell, etc., Co.*, 95 Tenn. 172, 31 S. W. Rep. 1002; *Building, etc., Assn. v. Price (Md.)*, 41 Atl. Rep. 53, 42 L. R. A. 206; *Grogan v. Egbert*, 44 W. Va. 75.

<sup>5</sup> *Bayne v. Brewer Pottery Co.*, 82 Fed. Rep. 391.

<sup>6</sup> 123 Ind. 477, 24 N. E. Rep. 250.

<sup>1</sup> *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560; *King v. Goodwin*, 139 Ill. 102; *Beach on Receivers (Ald. Ed.)*, sec. 7, p. 10.

<sup>2</sup> *Hopkins v. Worcester, etc., Canal Co.*, L. R. 6 Eq. 447.

with it as any other person could having a title equal to that which the order of appointment by its terms confers, if the foreign jurisdiction permit; that is, capacity to sue may exist, but the right to act in that capacity flows from the will of the state in which recognition is asked. A purely voluntary assignment, however, is upon an entirely different footing, conferring title, not by law, but by contract; and the title of a receiver so acquired will be respected in any state whose laws are not contravened by it, if it is valid in the state in which it is made, and in which the assignor lives. In some jurisdictions, however, local considerations may have the effect to limit even a voluntary assignment by a debtor in an another state.<sup>7</sup>

*The Rule of Comity: Its Limitations.*—The courts of the jurisdiction in which assets of an estate in the hands of a foreign receiver may be situated may, upon principles of comity, assist such receiver to reduce the assets in that jurisdiction to possession, and otherwise permit him to deal with the property to the extent that the order of his appointment authorizes. But comity does not entitle a foreign receiver to deal with domestic assets in any manner, or to any extent, in contravention of the local policy, that is, the policy of the jurisdiction of the *situs* of the property sought to be affected by any act or proceeding of the receiver.<sup>8</sup> Thus, a foreign receiver of a foreign corporation is not entitled to bring and maintain an action upon a contract made by the corporation in a state with whose laws, entitling a foreign corporation to do business within its territory, it has not complied.<sup>9</sup> Nor do the principles of comity require that a court confer powers upon a foreign receiver, or permit him to bring and maintain actions, that will interfere with or impair the rights of domestic creditors; and this the courts universally refuse to do.<sup>10</sup>

<sup>7</sup> Weider v. Maddox, 66 Tex. 372, 1 S. W. Rep. 168; Askew v. Bank, 83 Mo. 366; Green v. Van Buskirk, 7 Wall. 150; Catlin v. Wilcox Silver Plate Co., 123 Ind. 477, 24 N. E. Rep. 250.

<sup>8</sup> National, etc., Bank v. McLeod, 38 Ohio St. 174; Hurd v. City of Elizabeth, 41 N. J. L. 1; Falkner v. Hyman, 142 Mass. 53; Moore v. Church, 70 Iowa, 208, 30 N. W. Rep. 855; Rogers v. Riley, 80 Fed. Rep. 759.

<sup>9</sup> Baker v. Lamb & Son, 102 Iowa, 47, 68 N. W. Rep. 686, 34 L. R. A. 704.

<sup>10</sup> Rogers v. Riley, 80 Fed. Rep. 759; Johnson v. Rogers, 72 Ky. 28, 43 S. W. Rep. 234; Bank v. Mc-

*Illustrations.*—Thus a foreign receiver of a foreign corporation will not be permitted to interfere with litigation by a domestic receiver of the same corporation conducted under the authority of the court appointing him; nor has the foreign receiver any right, through comity or otherwise, to be represented by counsel in such litigation.<sup>11</sup> And where receivers are appointed in different states to take charge of the property of an insolvent corporation therein, the receiver of the corporation in the state in which it is organized can do nothing to alter the *status* of property in the hands of a receiver appointed in another state; and contracts made by him affecting such property can confer no rights upon the other contracting parties.<sup>12</sup> But a foreign receiver is not precluded to bring an action for the recovery of real estate wrongfully held against him, where no rights of creditors are involved.<sup>13</sup> And the rights of creditors of the individual members of a partnership in the hands of a foreign receiver are secondary to the rights of the foreign receiver to the assets in the jurisdiction of the domicile of such creditors; but the rights of domestic creditors of the partnership are, of course, paramount to the rights of the foreign receiver, and are not required to be yielded through comity.<sup>14</sup>

*Priority of Domestic Creditors—Principle.*—The principle upon which this rule is founded is, as stated in a recent case, that "it is the policy of every government to retain within its control the property of a foreign debtor until all domestic claims have been satisfied, and hence the right of a receiver of a foreign court to sue, which is allowed only upon considerations of comity,

Leod, 38 Ohio St. 174; Vogt v. Covenant, etc., Assn., 21 Pa. Co. Ct. Rep. 351; Metzner v. Bauer, 98 Ind. 425; Catlin v. Wilcox Silver Plate Co., 123 Ind. 477, 24 N. E. Rep. 250; Willits v. Wait, 25 N. Y. 577; Hunt v. Columbian Ins. Co., 55 Me. 290; Paine v. Lester, 44 Conn. 196; Ward v. Pac. Mut. Life Ins. Co., 135 Cal. 235, 67 Pac. Rep. 124; Oliver v. Clark, 106 Fed. Rep. 402, 45 C. C. A. 360; Woodhull v. Farmers' Trust Co. (N. Dak.), 90 N. W. Rep. 795; Chicago, etc. R. Co. v. Keokuk, etc., Co., 108 Ill. 317, 48 Am. Rep. 557; Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668; Pugh v. Hurt, 52 How. Pr. 22.

<sup>11</sup> Johnson v. Southern Bldg. & Loan Assn., 99 Fed. Rep. 646.

<sup>12</sup> Day v. Postal Telegraph Co., 66 Md. 354, 7 Atl. Rep. 608.

<sup>13</sup> Small v. Smith, 14 S. Dak. 621, 86 N. W. Rep. 64; Oliver v. Clark, 106 Fed. Rep. 402, 45 C. C. A. 360.

<sup>14</sup> Grogan v. Egbert (W. Va.), 28 S. E. Rep. 714.

will be denied where it comes in conflict with the interests of domestic creditors."<sup>15</sup> In obedience to this rule, the rights of domestic attaching creditors are superior to the rights of a foreign receiver, and they will not be required to surrender property so attached to be removed to a foreign jurisdiction for purposes of sale and *pro rata* distribution, but may retain the advantage they have acquired.<sup>16</sup>

*Nonresident Attaching Creditors Accorded Rights of Domestic Creditors—Exception.*—

Before the law and its tribunals, it has been said, parties are on an equal footing. Once properly in court, and accepted as a suitor, no distinction will be made between domestic and foreign creditors. Where, therefore, nonresident attaching creditors are in court pursuing a remedy conferred upon foreign as well as upon domestic creditors, the rights of such creditors in attachment, as against a foreign receiver claiming the same property, will, like those of a domestic creditor, be superior to the rights of such receiver.<sup>17</sup> This rule, however, does not apply to a creditor in attachment in a foreign state, who is domiciled in the state in which the receiver is appointed.<sup>18</sup>

*Possession in Foreign Jurisdictions.*—But where a receiver has once obtained rightful possession of property, he will not be deprived of its possession when removed into a foreign jurisdiction in the performance of his official duties. While there, it cannot be taken from his possession by creditors residing within such jurisdiction, by attachment

or otherwise.<sup>19</sup> This rule has been held to rest, not alone upon the doctrine of comity, but upon the provision of the federal constitution which requires that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."<sup>20</sup> Thus, where a receiver, appointed in the state of Iowa, took with him into North Dakota notes in his hands as receiver, for use as evidence in a case pending in the courts of North Dakota, concerning the receivership, it was held that such notes, while in the hands of an attorney engaged in the action in said state, could not be seized and held under an attachment proceeding by a resident of North Dakota. And the supreme court of Missouri, in a recent case,<sup>21</sup> held that a receiver of a railroad, appointed by a court of competent jurisdiction by the Republic of Mexico, could not be deprived of a private car belonging to the receivership, at the instance of an Illinois creditor, by an attachment brought in Missouri while such car was within that state in the possession of such foreign receiver. In the opinion in that case it was said, MacFarlane, J., speaking for the court: "The principle upon which we think this case must be ruled is one of law, and not of comity. \* \* \*

The car, with all other property of the corporation, was held for the benefit of foreign as well as domestic creditors. The creditors residing in the United States had no rights superior to those of the creditors residing within the jurisdiction of the court. It cannot be seen how those rights became paramount when the property was brought by the lawful possessor, within the jurisdiction of the courts of the United States. Courts will protect the rights of domestic creditors, and will not permit property located in their jurisdictions to be carried away by a receiver of a foreign state or nation, until all such creditors are satisfied. But we know of no

<sup>15</sup> Mitchell, C. J., in *Catlin v. Wilcox Silver Plate Co.* *supra*; *Runk v. St. John*, 29 Barb. 585; *Bagley v. Railroad Co.*, 86 Pa. St. 291; *Hunt v. Insurance Co.*, 59 Me. 290; *State v. Railroad Co.*, 15 Fla. 202; *Thurston v. Rosenfield*, 42 Mo. 474.

<sup>16</sup> *Zacher v. Fidelity, etc., Co.*, 22 Ky. Law Rep. 987, 59 S. W. Rep. 493; *Day v. Telegraph Co.*, 66 Md. 354, 7 Atl. Rep. 608; *Bank v. Rockwell*, 58 Ill. App. 506; and see authorities in note 15, *supra*.

<sup>17</sup> *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Rhown v. Pearce*, 110 Ill. 350; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 24 N. E. Rep. 250; *Linville v. Hadden*, 88 Md. 594, 41 Atl. Rep. 1097; *Mason v. Manufacturing Co.*, 81 Md. 446, 32 Atl. Rep. 311; *Blake v. Williams*, 6 Pick. 286, 17 Am. Dec. 372; *Commercial Nat. Bank v. Matherwell, etc., Co.*, 95 Tenn. 172, 31 S. W. Rep. 1002, 29 L. R. A. 164.

<sup>18</sup> *Frowett v. Blank*, 9 Pa. Dist. Rep. 573; *Linville v. Hadden*, 88 Md. 594, 41 Atl. Rep. 1097; *Farmers' Loan & Trust Co. v. Bankers, etc., Co.*, 148 N. Y. 315, 42 N. E. Rep. 707.

<sup>19</sup> *Woodhull v. Farmers' Trust Co. (N. Dak.)*, 90 N. W. Rep. 795 (not yet published in official reports); *Cogill v. Woolridge*, 8 Baxt. 581, 35 Am. Rep. 716; *Robertson v. Stead*, 135 Mo. 135, 36 S. W. Rep. 610; *Merchants', etc., Bank v. Steel Co.*, 57 N. J. L. 336; *Chicago, etc., R. Co. v. Keokuk, etc., Co.*, 108 Ill. 317, 48 Am. Rep. 557; *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668; *Bagby v. Railway Co.*, 86 Pa. St. 291.

<sup>20</sup> Const. U. S. sec. 1, art. 4; *Woodhull v. Farmers' Trust Co.*, *supra*.

<sup>21</sup> *Robertson v. Stead*, *supra*.

principle upon which rights of domestic creditors can be created by reason of the property, in the lawful possession of the receiver, being brought within their jurisdiction. Such a rule would greatly embarrass the receiver in the discharge of his duties, and would in many cases injuriously affect the rights of creditors."

The California supreme court has held the contrary in a case in which the foreign receiver was vested, not with full title, but with the right merely of possession of the property attached. It is not clear, however, that the court's decision was made to rest upon the ground that the order of the court appointing the receiver gave him only a possessory, and not a full title. The attitude of the court may well be deduced from the expression in the opinion that, "to show a right superior to that of creditors, they must fall back upon the order appointing them receivers, and must depend upon the comity of this state as to the effect to be allowed to that order," and in no case, the court observed, will a foreign receiver be accorded a right that conflicts with the rights of citizens.<sup>22</sup>

*Liability to Third Parties and to Appointing Court.*—A court may appoint as its own receiver of property within its jurisdiction one who has been appointed receiver by a court of another jurisdiction.<sup>23</sup> In such a case, the receiver appointed in the ancillary proceeding, as to the administration of the property coming into his possession, must be governed entirely by the orders of the court appointing him.<sup>24</sup> Each court acts independently within its own jurisdiction, the relation between them being one merely of comity. The court of primary jurisdiction may indicate to the court of ancillary jurisdiction its views in matters pertaining to the latter receivership, which it may, or may not, in its discretion, adopt.<sup>25</sup> The court in which the primary suit is pending has no jurisdiction over the ancillary receiver, or over the property in his custody; and no question affecting the estate in the hands of the ancil-

lary receiver can by him be transferred to the court of primary jurisdiction.<sup>26</sup> Nor can the ancillary receiver justify himself for any act done under an order of the court having jurisdiction of the primary suit. Where, therefore, the ancillary receiver, without the knowledge and concurrence of the court appointing him, and by whose order the property was placed in his possession, sells such property and turns the proceeds of the sale over to the court having jurisdiction of the primary suit, leaving unpaid expenses incurred by him in the ancillary receivership, he may properly be charged with personal liability for such expenses.<sup>27</sup> Nor is an ancillary receiver in one state liable for the torts of the primary receiver of another state.<sup>28</sup> But where the same person has been appointed receiver for a private corporation by two federal courts in different districts as to property within one district only, such person has been said to be subject wholly to the court of the district in which the property is situated; and the fact that the suit in such district was subsequent to the suit in the other does not render it ancillary in such a sense as to authorize the receiver to deal with the property within the jurisdiction of that court without its consent, or to require a creditor having a lien on such property alone to go into the other district to assert his rights.<sup>29</sup> Likewise, it rests in the discretion of a court appointing an ancillary receiver whether it shall distribute the assets in its control, or transmit them to the foreign primary receiver;<sup>30</sup> though where there are no domestic creditors it is customary, as a matter of comity, for the ancillary receiver to be required by the court appointing him to transmit the assets in his hands as such to the primary receiver for ultimate distribution among those entitled thereto.<sup>31</sup>

*Rights of Foreign Receivers Enlarged by Contract.*—The rights of a foreign receiver against domestic creditors may be enlarged

<sup>22</sup> Reynolds v. Stockton, note 24, *supra*.

<sup>27</sup> Kirker v. Owings, 98 Fed. Rep. 499, 39 C. C. A. 132.

<sup>28</sup> Union Trust Co. v. Atchinson, etc., R. Co., 87 Fed. Rep. 530.

<sup>29</sup> Cohen v. Gold Creek, etc., Mining Co., 95 Fed. Rep. 380.

<sup>30</sup> Sands v. Greely, 88 Fed. Rep. 130, 31 C. C. A. 424.

<sup>31</sup> Rean v. Supreme Sitting, etc., 3 Pa. Dist. Rep. 323; Baldwin v. Hosmer, 101 Mich. 432, 59 N. W. Rep. 423

<sup>23</sup> Humphreys v. Hopkins, 81 Cal. 551, 8 Pac. Rep. 422, 6 L. R. A. 792.

<sup>24</sup> Shinney v. North American Savings, etc., Assn., 97 Fed. Rep. 9.

<sup>25</sup> Reynolds v. Stockton. 43 N. J. Eq. 211, 10 Atl. Rep. 385.

<sup>26</sup> Fletcher v. Harvey, etc., Co., 84 Fed. Rep. 555.

by contract; and where parties have contracted with reference to the laws of a particular state, making such laws a part of their contract, such laws may be recognized and enforced in a foreign jurisdiction, notwithstanding that such enforcement may have the effect to detract somewhat from the rights of the domestic creditors.<sup>32</sup> Thus, in the case of *Parsons v. Charter Oak Life Ins. Co.*, *supra*, where a life insurance company of Connecticut, having creditors and assets in Iowa, became insolvent, the Connecticut statute relating to such companies providing for the appointment of a receiver to be appointed in that state to have charge of all of the assets of the company, it was held that this statute became part of the contract of policy holders with the company, and that, therefore, the Iowa creditor policy holders had no superior right to the assets of the company in that state over the Connecticut receiver. In a Michigan case in which this right of a creditor was attempted to be asserted in such a case, the court said: "Wherever such a claim has been asserted in equity, it has been denied, so far as we have been able to ascertain, upon the ground that the member has contracted with reference to the law of the state which created the corporation of which he became a member, and must, therefore, submit to the jurisdiction and judgments of its courts in case of the insolvency of the corporation."<sup>33</sup>

*Actions Against Foreign Receivers.*—If, as a matter of comity, a foreign receiver may bring and maintain an action to collect a debt due his estate, or any other action or suit involving the recognition of his character as a receiver, it follows that, upon like principles, a foreign receiver may be sued in any state properly acquiring jurisdiction.<sup>34</sup>

*Leave to Sue—Presumption of Character.*—A foreign receiver, like a domestic receiver, should ordinarily obtain the leave of the for-

eign court to bring his action therein;<sup>35</sup> but failure to do so does not deprive the court of jurisdiction, and any objection on this ground is waived by failing promptly to insist upon it.<sup>36</sup>

Where the same person is appointed receiver in two jurisdictions, in one in a primary action, and in the other in an ancillary proceeding, and thereafter brings a suit in the court having jurisdiction of the ancillary proceeding, it will be presumed that he sues, not as a foreign, but as an ancillary and domestic, receiver.<sup>37</sup>

*Actions on the Statutory Liability of Stockholders.*—Ordinarily a foreign receiver has no common law power or authority to sue upon, and to enforce the payment of, the statutory liability of the stockholders of an insolvent foreign corporation: authority to do so must be conferred by statute, and a special remedy conferred by one state cannot be carried, by a receiver, into a foreign jurisdiction.<sup>38</sup> But where a receiver, appointed in a foreign jurisdiction, is the only one who, under the law of the state of his appointment, can enforce the liabilities of stockholders, he will be entitled to enforce, in any state, such liability in an action in his own name.<sup>39</sup>

GLENDIA BURKE SLAYMAKER.

Anderson, Indiana.

<sup>32</sup> *Pearson v. Leary* (W. Va.), 36 S. E. Rep. S. E. Rep. 149; *Castleman v. Templeman*, 87 Md. 40 Atl. Rep. 275.

<sup>33</sup> *Le Fevre v. Matthews*, 39 App. Div. 232, 57 N. Y. Supp. 128; *Pearson v. Leary*, 36 S. E. Rep. 35, 37 S. E. Rep. 149.

<sup>34</sup> *Sullivan v. Sheehan*, 89 Fed. Rep. 247.

<sup>35</sup> *Murty v. Allen*, 71 Vt. 377, 45 Atl. Rep. 752.

<sup>36</sup> *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. Rep. 888, 49 L. R. A. 301; *Howarth v. Angle*, 39 App. Div. 151, 57 N. Y. Supp. 187; *Howarth v. Ellwanger*, 86 Fed. Rep. 54; *Bell v. Farwell*, 176 Ill. 489, 52 N. E. Rep. 346; *Hale v. Tyler*, 104 Fed. Rep. 757.

#### LANDLORD AND TENANT—DUTY TO CONSTRUCT FIRE ESCAPES.

JOHNSON V. SNOW.

*Court of Appeals at St. Louis, Missouri, November 3, 1903.*

Under Laws 1901, p. 219, § 1, providing that it shall be the duty of the owner, proprietor, lessee or keeper of every hotel, lodging house, etc., to construct fire escapes, and section 5, making it a misdemeanor for the owner, proprietor, lessee, or manager of any building within the terms of the act to neglect or refuse to comply therewith, the duty of constructing a fire escape upon a building leased for hotel purposes rests on the lessee, and not on the lessor.

<sup>32</sup> *Wheeler v. Dime Savings Bank*, 110 Mich. 437, 74 N. W. Rep. 496; *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. Rep. 305; *Buswell v. Supreme Sitting, etc.*, 161 Mass. 224, 36 N. E. Rep. 1065; *Rean v. Supreme Sitting, etc.*, 3 Pa. Dist. Rep. 323; *Weintergarter v. Insurance Co.*, 32 Fed. Rep. 314; *Rundel v. Association*, 10 Fed. Rep. 720.

<sup>33</sup> *Wheeler v. Dime Savings Bank*, note 32, *supra*.

<sup>34</sup> *Le Fevre v. Matthews*, 39 App. Div. 232, 57 N. Y. Supp. 128; *Paige v. Smith*, 99 Mass. 395; *Lawrence v. Lawrence*, 3 Barb. Ch. 74.

Defendants are the owners in fee of lot 38 and a part of lot 37, city block 986, city of St. Louis, upon which they, prior to July 25, 1899, erected two dwelling houses, known as Nos. 2700 and 2702 Olive str et. On July 25, 1899, they leased the buildings to William Gillham and Catherine Gillham for a term of 10 years, to begin September 1, 1899. The buildings were leased as one building to be used and occupied as a hotel, and the lease provided that the buildings were not to be used or occupied for any other purpose without the written assent of the lessors, their heirs or assigns. It further provided that "all repairs deemed necessary by the lessees to be made at the expense of said lessees, with the consent of said lessors and not otherwise." The said lessors, their heirs or assigns, were, at all reasonable times and hours, to have the right to enter upon and inspect the state and condition of said premises. The lessees took possession of the premises under the lease on September 1, 1899, and from said date up to and including the 9th of February, 1902, engaged in the business of, and were, conducting a hotel or lodging house in said premises as tenants under the lease. On the 9th of February, 1902, Walter Johnson, plaintiff, was a lodger in the house, and occupied an outside room on the third floor. About 2 o'clock on the morning of February 9, 1902, a fire broke out in the premises, and Johnson made an effort to make his escape by the only pair of stairs in the premises leading from the third story to the ground floor, but was cut off from the stairway by the fire. The premises were unprovided with any outside fire escape, and to save himself from the flames, Johnson was compelled to jump to the pavement, a distance of about 30 feet. As a result of the jump, he suffered fractures of the bones of his legs, and was otherwise injured. To recover for these injuries, this suit was brought. The petition counts on the failure and negligence of the defendants, as owners in fee of the premises, to provide exterior fire escapes, as required by an act of the legislature approved March 27, 1901, Laws 1901, p. 219. Defendants denied that the obligation to provide an exterior fire escape was on them, and at the close of plaintiff's evidence moved for an instruction that plaintiff could not recover. The court denied the instruction, and sent the case to the jury, who returned a verdict for plaintiff and assessed his damages at \$3,500. A motion for new trial was filed by defendants, which the court sustained on the ground that it committed error in refusing to grant defendant's instruction that plaintiff could not recover. From the order sustaining the motion for new trial, plaintiff appealed.

BLAND, P. J. (after stating the facts): The appeal presents but one question for discussion and dissolution, viz., whether or not defendants, under the evidence, were obliged by the Act of 1901, Laws 1901, p. 219, to attach an exterior fire escape to the building. The act is as follows:

"Section 1. It shall be the duty of the owner,

proprietor, lessee or keeper of every hotel, boarding and lodging house, school house, opera house, theatre, music hall, factory, office building in the state of Missouri, and every building therein where people congregate or which is used as a business place, or for public or private assemblage which has a height of three or more stories to provide said structures with fire escapes attached to the exterior of the building and by staircases located in the interior of the building. The fire escapes shall commence at the sill of the second story window and run three feet above the upper window sill of the upper story with an iron ladder from the upper story to the roof, and when stopped off at the second story they shall be provided with an automatic drop stair from the second story to the ground, to be held up by a weight and wire cable when not in use. School buildings, opera houses, theatres and church buildings, also hospitals, blind and lunatic asylums and seminaries shall each have a fire escape built solid to the ground and at the bottom enclosed with heavy wire or elevator enclosure up to eight feet in height, with a wire or iron door with knobs on the inside so that it cannot be opened from the outside. In no case shall a fire escape run past a window where it is practicable to avoid it. All fire escapes required by this act must be of the kind known as stationary fire escapes. All buildings heretofore erected shall be made to conform to the provisions of this act.

"Section 2. No ladder fire escape shall hereafter be used, and the fire escapes herein provided for shall be a stair fire escape, built on an angle of not more than fifty-five degrees, with proper risers and treads and shall be constructed so as to be placed on a blank wall, where practicable, with balconies to reach the opening doors or windows, as the case may be, and with one or more landings in each story and enclosed on the sides with wire bank rail running three feet on the same angle as the stairs.

"Section 3. All buildings three or more stories in height, used for manufacturing purposes, hotels, dormitories, schools, seminaries, hospitals or asylums, shall have at least one fire escape for every twenty to fifty persons for whom working, sleeping or living accommodations are provided above the second story, and all public halls which provide seating room above the first or ground story shall have such a number of fire escapes as shall constitute one fire escape for every hundred persons, calculated on the seating capacity of the hall.

"Section 4. All buildings hereafter erected in this state which shall come within the provisions of this law, shall, upon or before their completion, be provided with fire escapes of the kind and number and in the manner set forth in this law, and any violation of this section shall constitute a misdemeanor on the part of the owner of such building, punishable as provided in section five.

"Section 5. The owner, proprietor, lessee or manager of a building which, under the terms of this act, is required to have one or more fire escapes, who shall neglect or refuse for the period of sixty days after this law takes effect to comply with its provisions, shall be deemed guilty of a misdemeanor, and on conviction, shall be fined not less than fifty nor more than two hundred dollars, or by imprisonment in the county or city jail not more than three months, or by both fine and imprisonment, and each day shall be deemed a separate offense.

"Section 6. All acts and parts of acts in conflict herewith are hereby repealed. It is made the duty of all prosecuting attorneys in this state to institute and prosecute infractions of this law. Whenever it shall come to the knowledge of the chief of the fire department or commissioner of public buildings in any city or the sheriff in any county that any violation of this act has occurred, it shall be his duty to report the fact to the prosecuting attorney."

It is conceded that the structure and use of the building brought the hotel within the terms of the foregoing law, and that it was the duty of some one—either the owners in fee or the lessees—to have attached to the building the exterior fire escape required by the statute. Before the lease the buildings on the premises were occupied as dwelling houses. For this reason there was no obligation on the defendants, prior to the execution of the lease, to provide the rope-ladder escapes provided for by section 9036, Rev. St. 1899, then in force. We think that the above section (9036) is by implication repealed by the law of 1901; but if it is still in force, and, had the action been grounded on that section, it is clear that the defendants would not be liable, for under that section the duty to furnish the interior rope-ladder escapes rests upon hotel keepers, who in this instance were the Gillhams. Section 9037, Rev. St. 1899, to which appellant has referred in his brief, has no application to the case, for the reason the buildings are not within the terms of that section. At the time of the fire the lessees were in the exclusive possession of the premises, and they were under their exclusive control as lessees of the defendants. *Ziegler v. Fallon*, 28 Mo. App. 295; *O'Neil v. Flanagan*, 64 Mo. App. 87; *Gibson v. Perry*, 29 Mo. 247. The use to which the buildings were put was for their benefit, and not for the benefit of the defendants. At common law, if the premises were provided with the ordinary means of ingress and egress to all parts thereof, there was no obligation on either the owners in fee or the lessees to provide any sort of exterior fire escape for the safety of the inmates or lodgers. *Pauley v. Steam G. & L. Co.*, 131 N. Y. 90, 29 N. E. Rep. 999, 15 L. R. A. 194; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661; *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. Rep. 393, 32 L. R. A. 782. The language of the first section is: "It shall be the duty of the owner,

proprietor, lessee or keeper," etc., to provide the exterior fire escapes. The object of the statute, as expressed in the title of the act, is "to protect and preserve human life." This duty rests upon some one of the class of persons pointed out by the first section, and not upon all of such persons, for they are mentioned disjunctively, not conjunctively. This is made more obvious by section 5 of the act, which makes it a misdemeanor for the owner, proprietor, lessee, or manager of any building coming within the terms of the act to "neglect or refuse for the period of sixty days after this law takes effect" to attach the required fire escape. The persons who may be convicted under this section are named or described in the disjunctive, and for this reason no two of them—for instance, the owner and lessee—could be convicted for the identical refusal or neglect to attach the fire escape. If such had been the intention of the legislature, the owner, lessee, etc., would have been conjoined, and not disjoined. So it appears to us that if the intention of the legislature was to create a joint and several obligation on the owner, proprietor, lessee and keeper to attach the fire escape, they would have been named conjunctively, and we conclude that a joint and several obligation is not imposed. It seems to us that the purpose of the legislature was to require the person whose duty it was at common law to keep the premises in a safe condition to provide the additional safeguard of an exterior fire escape to afford the occupants of the buildings designated an additional means of escape in case of fire. At common law the duty to keep the premises in a reasonably safe condition devolved upon the tenants or lessees. *Ward v. Fagin*, 101 Mo. 669, 14 S. W. Rep. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650; *Peterson v. Smart*, 70 Mo. 34; *Burnes v. Fuchs*, 28 Mo. App. 279; *Gordon v. Peltzer*, 56 Mo. App. 599; *City of Memphis v. Miller*, 78 Mo. App. 72; *Camp v. Rogers*, 44 Conn. 291. We find support for this view in the case of *Lee v. Smith*, 42 Ohio St. 459, 51 Am. Rep. 839, wherein was construed the fire escape statute of Ohio (80 Ohio Laws, p. 188), which made it the duty of "any agent or owner of any factory, workshop, tenement house, inn or public house, more than two stories high to provide a convenient exit from the upper stories in case of fire," etc. The facts were, the upper story of the building owned by the defendant was occupied by a lessee who conducted a factory therein. The plaintiff's intestate was an employee of the owner of the factory, and lost her life by a fire in the premises. It was contended that the statute imposed the obligation to provide fire escapes on the owner of the building. In discussing the liability of the owner in fee, the court said: "The owner of a building may have no interest in the use to which it is applied. Hence, the owner of a building and the owner of the factory which is conducted in the building may be different persons, and when this

is so the owner of the factory, and not the owner in remainder or reversion of the building, is the person on whom the statute imposes the duty." Further on the court said: "The facts of this case illustrate the construction which should be placed on this statute, to-wit, that where the owner of the factory is one person, and the owner of the building in which the factory is located is another, the former is the person on whom the duty named in the statute is enjoined. Again, in the absence of all legislation on the subject, the common law, founded on principles of right and justice, implies, from the relation of master and servant, a duty on the former to provide reasonable means for the safety of the latter. Hence it is more reasonable to infer that the legislature intended to impose the duty required by this statute upon the owner of the factory, who assumes the relation of master to those employed therein, and for whose safety the duty imposed by this statute is enjoined, than to hold that it was intended to impose the duty upon the owner in fee of the factory building, who may not sustain any relation to the employees in the factory from which the duty to provide for their safety could be implied, and who may not even know that his building is being used as a factory or workshop." In 1879 the state of Pennsylvania had a law on the same subject, the first section of which is similar to our act of 1901, and on all fours with it, in the clause designating the persons or class of persons who shall provide fire escapes. It reads as follows: "That all the following described buildings, within this commonwealth, to-wit: Every building used as a seminary, college, academy, hospital, asylum or a hotel for the accommodation of the public, every storehouse, factory, manufactory, or workshop of any kind in which employees or operatives are usually employed at work in the third or any higher story, every tenement house or building in which rooms or floors are usually let to lodgers or families, and every public school building, when any of such buildings are three or more stories in height, shall be provided with a permanent safe external means of escape therefrom in case of fire; and it shall be the duty of the owners or keepers of such hotels, of the owners, superintendents or managers of such seminaries, colleges, academics, hospitals, asylums, storehouses, factories, manufactories, or workshops, of the owners or landlords of such tenement houses, or their agents, and of the board of school directors of the proper school district, to provide and cause to be affixed to every such building such permanent fire escape." P. L. 1879, p. 128. This statute was construed in the case of *Schott v. Harvey*, 105 Pa. 222, 51 Am. Rep. 201, not to apply to the owner in fee, who had leased the premises to a tenant who occupied the same. The court, through Paxson, J., discussing the section, said: "The duty is imposed upon the owners, superintendents, or managers of factories, the owners or keepers of ho-

tels, owners or landlords of tenement houses, or their agents, etc. Which of these classes did the legislature intend to make responsible for a neglect to comply with the law? If the object was to impose a joint liability upon all, the act would not have been framed in the disjunctive. A more reasonable construction would seem to be that it was intended to reach the person in possession with power of control, whether he be owner, superintendent or manager. However hard such a rule might be in the case of a superintendent or manager, he could avoid the responsibility by declining to act as such in a factory where his principal refused to provide it with an efficient fire escape." Further on it is said that the meaning of the word "owner" depends in a great measure upon the subject-matter to which it applies, and is undoubtedly broad enough to cover a tenant for years, a tenant for life, and a remainderman in fee, as each is an owner, and that, where a legislature used a term of such varied meaning, we must presume they intended such a one as is in the possession and occupancy of the premises, who has the immediate dominion and control over it, and the manner of whose use it makes a fire escape necessary. In the case of *Sewell v. Moore*, 166 Pa. 570, 31 Atl. Rep. 370, relied upon by the appellant, the question of whether the owner in fee or the tenant is liable under the act of 1879, and subsequent acts amendatory thereof, was not raised or discussed, and does not in the least weaken the authority of the *Schott* case. The case of *Landgraf v. Kuh*, 188 Ill. 486, 59 N. E. Rep. 501, is cited by appellant as supporting his contention that it was the duty of the defendants, as owners in fee, to provide the external fire escape. The Illinois statute is materially different from ours in several particulars. It does not designate the person or class of persons whose duty it shall be to provide the fire escape. It provides that the supervisors and commissioners shall give to the owner or owners, trustees, lessees, or occupants of any building coming within the terms of the statute, notice, demanding such owner, trustee, lessee, or occupant, or either of them, to place or cause to be placed upon such building such fire escape. The building in which the fire occurred had fire escapes placed there by the owner, but it was claimed they were insufficient. The building was seven stories high. Its various floors were arranged in lofts and offices, and rented by the defendants, the owners in fee, to various tenants. *Kittie Landgraf*, the plaintiff's intestate, for whose death the suit was brought, was in the employ of *Stein & Co.*, who occupied a portion only of the fourth floor, and conducted a factory therein. The court, in referring to the *Schott* and other like cases, said: "The construction thus contended for may have been proper, as applied to the statutes under consideration where such construction was adopted, but cannot be held to be the proper construction of the Illinois Act of

1885, Laws 1885, p. 201. Section 2 of the latter act provides that "all buildings of the number of stories used for the purposes set forth in section 1 of this act, which shall be hereafter erected in this state, shall, upon or before their completion, each be provided with fire escapes of the kind and number, and in the manner set forth in said section 1 of this act." The fact that the buildings are to be provided with fire escapes "upon or before their completion" indicates that the duty of providing such fire escapes devolves upon the owners of the buildings. The fire escapes are required to be a part of the construction of the building itself. Moreover, the notice commanding such fire escape to be placed upon the building is required by section 3 to be given to "the owners, trustees, lessee, or occupant, or either of them." The injunction being in the alternative, the notice may be given to the one as well as to the other, and therefore to the owner as well as to the lessee or occupant. We are therefore of the opinion that the appellees were not relieved from liability in regard to the placing of fire escapes upon their building because the fourth floor of the premises, where appellant's intestate was at work at the time of her death, was in the possession and under the control of tenants of appellees, instead of being directly in the possession of appellees themselves." In *McColloch v. Ayer*, 96 Fed. Rep. 178, it was held that the power, under the Illinois statute, of determining upon whom rests the duty of providing a fire escape in any particular case, was vested in the inspector, and, until he had designated such person by the required notice, a court could not determine that either the owner, lessee, or occupant was liable by reason of the failure to comply with the statute. It seems to us that this is a more reasonable construction than the one given in the *Landgraf* case. At any rate, the case does not shake in the least the reasoning or authority of the *Schott* case. The city charter of Brooklyn, New York, provides that all buildings more than two stories high, occupied or built to be occupied as a factory, mill, etc., in which operatives are employed, shall be provided with fire escapes, and that the owner or owners of any such building upon which any fire escapes may now be or may hereafter be erected shall keep the same in repair. In *Abrahan v. Manufacturers' Nat. Bank*, 16 N. Y. St. Rep. 750, cited and relied on by appellant, it was held that it was the duty of the owner to provide the fire escapes, notwithstanding the premises were leased for a term of years, and were in possession and under the control of the lessee. We cannot see what other conclusion could have been arrived at, from the very wording of the charter.

When the law requires a landlord to provide exterior fire escapes (as does the Act of 1901) on all buildings coming within its terms, thereafter erected, it is plain his obligation to keep them in repair remains, although he may have let them

to a tenant who is in possession. 2 *Wood on Landlord & Tenant* (2d Ed.), § 381, p. 841; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536. And if the premises in question had been erected for a hotel after the Act of 1901 took effect, we have no doubt that defendants would have been obliged to attach and keep in repair the required fire escapes. Section 4, Acts 1901. But the buildings in question were not erected for a hotel, but for private dwellings, and were erected prior to the taking effect of the act. They were converted into a hotel by the Gillhams, the lessees, for their own use and profit. The plaintiff, when he was injured, was a guest of the lessees, occupying a room in their hotel, and it was their duty to keep the premises in a reasonably safe condition to prevent injury or damage to him. They were in possession and had exclusive control of the premises, and were, in a sense, the owners thereof; and we think, on the facts of the case, the first section of the Act of 1901 imposed the duty on them to provide the fire escape. We are supported in this view by the cases of *Lee v. Smith* and *Schott v. Harvey*, *supra*.—the only cases to which we have been cited, or have been able to find, that throw any light on the question in hand.

Our conclusion is that the learned circuit judge did not err in granting the motion for rehearing, and affirm the judgment.

REYBURN and GOODE, JJ., concur.

NOTE.—*The Law Applicable to Fire Escapes, at Common Law and Under Modern Statutes.*—The fire escape is a creation or rather an invention of modern civilization. It is designed primarily to save and protect the life and limb of the citizen entrapped by fire in one of our large, modern, and sometimes alleged to be fireproof, office, factory and hotel buildings in all of our larger cities.

*Responsibility at Common Law.*—It is admitted that at common law no obligation rested on the master to provide means of escape from fire for his employees. *Jones v. Granite Mills*, 126 Mass. 84, 90, 30 Am. Rep. 661, 666; *Pauley v. Lantern Co.*, 131 N. Y. 90, 29 N. E. Rep. 990, 15 L. R. A. 194. In the case of *Jones v. Granite Mills*, *supra*, where plaintiff, an employee in defendant's factory, sued to recover for injuries from a fire from which she was unable to escape because of defective exits, the court, in denying the right of plaintiff to recover, said: "It cannot be said that failure to construct proper and additional means of exit from a mill in case of fire in any way contributed to the occurrence of the fire itself. All that can be said is that if they had been provided, some of the results that followed from the fire might have been lessened, alleviated, or prevented. And the narrow question is presented, whether a master is required by the common law so to construct the mill, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible. We know of no principle of law by which a person is liable in an action of tort for mere nonfeasance by reason of his neglect to provide means to obviate or ameliorate the consequences of an act of God, or mere accident. And we are, there-

fore, of opinion that it is no part of the duty of a master to his servant, employed in a building properly constructed for the ordinary business carried on within it, in the absence of a statutory requirement, to provide means of escape from it, or to have remedial agencies at hand to alleviate the results, or to insure the safety of the servant from the consequence of a casualty to which his negligence does not directly contribute." But see *Schwandner v. Birge*, 33 Hun, 186, which seems to intimate a different rule. It is also held that no common law obligation rests upon the landlord or owner of a building to provide it with means of escape from fire. *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. Rep. 393, 32 L. R. A. 782. The general rule at common law may, therefore, be stated to be that fire escapes need not be provided by a landlord, master or any other proprietor, for the safety of a tenant, employee or anyone on the premises by invitation or permission unless this is required by statute or ordinance.

*Responsibility Under Statute.—Landlord, Tenant or Proprietor.*—There is some diversity of opinion as to who is liable—landlord, tenant or proprietor—under a statute or ordinance requiring fire escapes to be erected, due possibly, as the court suggests in the principal case, to the difference in the phraseology of the different laws on the subject. In Pennsylvania the act provides that "owners, superintendents, or managers" of factories should provide fire escapes therein. The Supreme Court of Pennsylvania in the case of *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201, so much relied upon by the court in the principal case, held that the tenant under lease of a factory, and not the landlord, was the "owner" within the meaning of that term in the statute. The case is commented upon with sufficient fullness by the court in the principal case. The argument in both is practically the same. See also to same effect, *Lee v. Smith*, 42 Ohio St. 459, 51 Am. Rep. 839, also fully discussed in the principal case. This case follows the *Schott* case exactly, holding that a statute imposing upon the owners of factories and workshops the duty of providing fire escapes was not applicable to the owners of premises in possession of lessees. The argument in the *Schott* case, however, if carried to its logical conclusion, would release the owner of a building from liability, unless he was an actual occupant or exercised actual control over the business transacted therein. Suppose an owner of a large building rents out the second, third, fourth and succeeding floors to different tenants. Under the decision in the *Schott* case, each of the tenants in possession is the "owner" of the building, within the meaning of a law requiring the owner of a building to erect fire escapes, and in order to escape liability all of these tenants must get together and put up a fire escape if they desire to escape liability. What more unjust construction could there be than that. The case of *Abrahan v. National Bank*, 16 N. Y. St. Rep. 750, answers the argument in the *Schott* case with convincing force. The ordinance of Brooklyn imposed the liability to erect fire escapes on the "owner of the building" very similar to the provisions, in that one respect, of the Pennsylvania statute. The court, however, in this case does not play upon the word "owner," but holds that where an owner of a large building leases it for a factory or hotel or for any other purpose which, under the ordinance, required the erection of a fire escape, he was bound to erect a fire escape on the premises or be liable for any injury that might occur for failure to do so. The court even goes

further and holds that even where the owner was not directly informed of the purposes of the lessees, he was liable, nevertheless, if any of the provisions or conditions in the lease implied what the use was to be. The rule here announced would seem to make the owner in fee of the premises liable to erect fire escapes on a building which in its original or prior use was not required by statute to have fire escapes, if he leases it for a purpose which does require their erection. The case of *Landgraf v. Kuh*, 188 Ill. 486, 59 N. E. Rep. 501, which is extensively quoted in the principal case, is along the same line as the New York case, holding that the owner of a building is not relieved from liability because the building is in the possession of tenants. An interesting debate has arisen over the question as to the primary liability under the new statute in Illinois, which provides that buildings of certain height shall be furnished with fire escapes and providing also for an inspector who should have authority to designate who is responsible for their erection. In *McColloch v. Ayer*, 96 Fed. Rep. 178, *Kohlsaat, J.*, held that no liability was imposed under the statute for a failure to erect fire escapes until the inspector designated the party required to erect them. In distinguishing the provisions of this statute from the previous one and from those of other states, the learned judge said: "There is a wide difference between a provision that 'all buildings shall be provided' and 'it shall be the duty of the owner to provide.'" In the recent case of *Arms v. Ayer*, 192 Ill. 601, 61 N. E. Rep. 851, the supreme court of Illinois repudiates this construction and holds that under the Fire Escape Act of 1897, the duty of equipping buildings with fire escapes rests primarily upon the owner of the building, and that this duty and the liability consequent upon its nonperformance are not dependent upon the serving of a notice by the inspector of factories to erect such escapes.

*Contributory Negligence as a Defense.*—It has been held that it would be going too far to hold as matter of law that the party injured was bound to investigate the premises in advance and search for convenient means of escape in case of fire, and failing to find them, that it is his duty to seek employment elsewhere, or else be deemed to have waived the performance of a duty imposed by statute on the defendant. *Abrahan v. National Bank*, 16 N. Y. St. Rep. 750; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536.

*Constitutionality of Fire Escape Laws.*—It is well sustained by authority as well as by common sense and reason that the state or public has such an interest in the arrangement of hotels, manufactories and places where large numbers of persons are employed as to entitle them to recognition as proper subjects, under the police power, of legislative regulation. *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661, 666. Various features of acts of this character often are questioned as to their constitutionality. Many of these features arose and are fully discussed in the recent case of *Arms v. Ayer*, 192 Ill. 601, 61 N. E. Rep. 851. In this case are discussed whether the title to the Illinois act was sufficiently explicit, whether the powers of the inspector were not judicial and legislative in their nature, and whether the whole act was not unconstitutional as being a local or special law. The act was sustained in every one of these particulars.

*Construction of Fire Escape Laws.*—An owner of a building is not liable for injuries occasioned by a

fire escape used for purposes other than escape from fire. Thus where a tenant by going out upon the fire escape without necessity therefor. *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555. The owner in such cases owes no duty to the tenant except to keep the fire escape safe enough for fire purposes. The owner, also, will not be permitted to wait until he has been directed by the proper authorities to provide escapes before doing so, nor can he shelter himself behind the negligence of any public officer whose duty it might have been to notify him of his failure to erect fire escapes. *McLaughlin v. Armfield*, 58 Hun, 376; *Willy v. Mulledy*, 78 N. Y. 314, 34 Am. Rep. 536; *Rose v. King* (Ohio), 15 L. R. A. 160.

As to the effectiveness of the fire escape erected, the rule is that they must be such as would be considered safe by men of ordinary prudence, but need not be the safest that could be devised, unless the statute prescribes in detail the exact plans. If the escape is a reasonable one no liability will arise from the fact that the fire originates in such a locality as to cut off access to it. *Keely v. O'Connor*, 106 Pa. St. 321. One authority holds that the approval of the inspection of the fire escape erected will fully relieve the owner of any subsequent liability. *Pauley v. Lantern Co.*, 131 N. Y. 90, 15 L. R. A. 194.

An ordinance requiring fire escapes on buildings of specified kinds when it is a subsection of a general ordinance covering the whole subject of erection of buildings within the city, repeals by necessary implication an earlier ordinance which made a different list of the buildings to be provided with fire escapes and placed the control of the matter in the hands of a different officer. *Schmalzried v. White*, 97 Tenn. 36, 32 L. R. A. 782. But see *City of New York v. Trustees*, 83 N. Y. Supp. 442.

*Penal or Civil Liability.*—It is settled by authority that, although a statute requiring the erection of fire escapes also provides express penalties for any disobedience of any provision of the statute, nevertheless, the enforcement of such penalties do not constitute the sole remedy of one injured by a violation of the statute. *Pauley v. Lantern Co.*, 131 N. Y. 90, 15 L. R. A. 194, 197. The court said: "The requirement of fire escapes was for the direct and special benefit of the operatives in such factories, and intended for their protection; and the rule applies that when a statute commands or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage, or for a wrong done to him contrary to its terms. See also *Willy v. Mulledy*, 78 N. Y. 310. Where the erection of fire escapes is required by ordinance the rule is not so well settled as in the case of a statute on the same subject. While all authorities concede that the violation of a general statute will furnish ground for a civil action on the part of any person injured by such violation, the authorities are not agreed that the same rule holds good with regard to the violation of a municipal ordinance. Thus some authorities hold that a civil action will not lie for violation of a municipal ordinance. Philadelphia, etc., R. R. v. *Ervin*, 89 Pa. 71; *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Vandyke v. Cincinnati*, 1 Disney (Ohio), 532. Other authorities hold that the same rule in this regard applies equally to statutes and ordinances. *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47; *Hayes v. Railroad*, 111 U. S. 228; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354. Our own opinion inclines strongly in favor of the position maintained by the

latter group of authorities. Without discussing this question, however, it is well settled that in a case where injury has resulted from the failure of a defendant to comply with the ordinances of a city as to fire escapes the jury may safely be instructed to look at that fact in connection with the other facts and circumstances shown in the evidence, in reaching a conclusion whether defendant was negligent or not under all the circumstances. *Schmalzried v. White*, 97 Tenn. 36, 32 L. R. A. 782.

ALEXANDER H. ROBBINS.

St. Louis, Mo.

## JETSAM AND FLOTSAM.

### THE LAW AS A BUSINESS VERSUS TRUE ADVOCACY.

Some time ago we called in question the oft repeated statement of the Hon. James B. Dill, the millionaire corporation lawyer, that law is becoming a plain matter of business, that in the future only the lawyer who is also a good business man will succeed. We challenged this statement because we believed that Mr. Dill had lost all conception of true advocacy, and was describing the solicitor rather than the advocate as these terms are used in England. 57 Cent. L. J. 307. We are gratified to find that our conception of the situation meets the fullest concurrence of one of the greatest trial lawyers in New York city, Mr. Francis L. Wellman. In the latter's preface to his recent and excellent work on the "Art of Cross-Examination," the learned author writes as follows:

WHAT ARE "BUSINESS LAWYERS."

I am aware that many members of my profession still sneer at trial by jury. Such men, however—not among the unsuccessful and disgruntled—will, with but few exceptions, be found to have had but little practice themselves in court, or else to belong to that ever growing class in our profession who have relinquished their court practice and are building up fortunes such as were never dreamed of in the legal profession a decade ago, by becoming what may be styled business lawyers—men who are learned in the law as a profession, but who through opportunity, combined with rare commercial ability, have come to apply their learning—especially their knowledge of corporate law—to great commercial enterprises, combinations, organizations, and reorganizations, and have thus come to practice law as a business.

ADVOCACY AS AN ART.

The conduct of a case in court is a peculiar art for which many men, however learned in the law, are not fitted; and where a lawyer has but one or even a dozen experiences in court in each year, he can never become a competent trial lawyer. I am not addressing myself to clients, who often assume that, because we are duly qualified as lawyers, we are therefore competent to try their cases; I am speaking in behalf of our courts, against the congestion of the calendars, and the consequent crowding out of weighty commercial litigations.

One experienced in the trial of causes will not require, at the utmost, more than a quarter of the time taken by the most learned inexperienced lawyer in developing his facts. His case will be thoroughly prepared and understood before the trial begins. His points of law and issues of fact will be clearly defined and presented to the court and jury in the fewest possible words. He will in this way

avoid many of the erroneous rulings on questions of law and evidence which are now upsetting so many verdicts on appeal. He will not only complete his trial in shorter time, but he will be likely to bring about an equitable verdict in the case which may not be appealed from at all, or, if appealed, will be sustained by a higher court, instead of being sent back for a retrial and the consequent consumption of the time of another judge and jury in doing the work all over again.

#### DISTINCTION BETWEEN BARRISTERS AND OFFICE LAWYERS.

These facts are being more and more appreciated each year, and in our local courts there is already an ever increasing coterie of trial lawyers, who are devoting the principal part of their time to court practice. A few lawyers have gone so far as to refuse direct communication with clients excepting as they come represented by their attorneys. It is pleasing to note that some of our leading advocates who, having been called away from large and active law practice to enter the government service, have expressed their intention, when they resume the practice of the law, to refuse all cases where clients are not already represented by competent attorneys, recognizing, at least in their own practice, the English distinction between the barrister and solicitor. We are thus beginning to appreciate in this country what the English courts have so long recognized: that the only way to insure speedy and intelligently conducted litigations is to inaugurate a custom of confining court practice to a comparatively limited number of trained trial lawyers.

When the public realizes that a good trial lawyer is the outcome, one may say of generations of witnesses, when clients fully appreciate the dangers they run in intrusting their litigations to so-called "office lawyers" with little or no experience in court, they will insist upon their briefs being intrusted to those who make a specialty of court practice, advised and assisted, if you will, by their own private attorneys. One of the chief disadvantages of our present system will be suddenly swept away; the court calendars will be cleared by speedily conducted trials; issues will be tried within a reasonable time after they are framed; the commercial cases, now disadvantageously settled out of court or abandoned altogether, will return to our courts to the satisfaction both of the legal profession and of the business community at large.

#### BOOK REVIEWS.

##### GARDNER ON WILLS.

Another horn-book has reached our desk. The subject of it is "Wills," and its author, George E. Gardner, professor of law in the Boston University School of Law. The author in his preface, makes the following comment on the results of his own labors.

"This book embodies an attempt to express clearly and concisely the law of wills, together with a general discussion of their probates. It is hoped that its statements are sufficiently clear to commend the work to students, and that the full citation of authorities—for it is believed that no case decided in the last fifteen years in any court of last resort in the United States genuinely illustrative of a principle has been overlooked—may render the book serviceable to practitioners. The work is the result of the study of the

leading decisions of whatever time and all the modern cases."

After a careful examination of the volume before us we do not consider that Mr. Gardner has in the least degree exaggerated the *practical value* of the work he offers the profession. Although the author disclaims any intention to analyze the principles or theories underlying the various rules of law pertaining to this subject, his statement of these rules in the black-letter text is so careful and accurate as to raise a suspicion in the mind that Mr. Gardner must have burned the midnight oil far into the night in his endeavor to find out what the exact rule ought to be. While it may be true, as he modestly asserts, that "a clear statement of the law of wills reveals in most instances its ultimate foundation," it is also true that no man can accurately state a rule of law of any importance whatever without a thorough acquaintance with the theory which led the people through custom or by statute originally to adopt it, and more important still, no jurist or law writer has ever succeeded in so stating his proposition that the mere statements themselves reveal not only "their ultimate foundations" but even the real meaning he intended to convey, unless his acquaintance with the principles underlying the subject matter of his disquisition has ripened into such an intimacy that no faction or element escapes his attention, or fails to secure its proper recognition. As far as our observation has gone Prof. Gardner has given evidence of ripe scholarship and the qualifications that combine to make the successful law writer. We commend Gardner on Wills especially to students desiring to get a clear grasp of a very important subject and to the older practitioner who often desires to begin his investigation with accurate statements of the fundamental rules pertaining to the question before him.

Printed in one volume of 726 pages and published by West Publishing Company, St. Paul, Minn.

#### HUMOR OF THE LAW.

A western lawyer had defended a prisoner charged with murder, with the result that the man was convicted and hanged. Shortly afterwards the same lawyer appeared before the judge with a fee bill for defending the man and attending to matters in probate closing up his estate. The bill was for a large sum, and the lawyer explained it in detail.

"Well, I'll approve it," announced the judge, "but it does seem to me as if you could have killed that man for less."

A judge of one of the United States circuit courts has a 5-year-old niece of whom he is very proud. A few days ago she came to him and said with a very serious air:

"Uncle, there is a question about law I want to ask you."

"Well, dear, what is it?" patiently inquired the judge.

"Uncle, if a man had a peacock and it went into another man's yard and laid an egg, who would the egg belong to?"

The judge smiled indulgently and replied:

"Why, the egg would belong to the man who owned the peacock, but he could be prosecuted for trespassing if he went on the other's property to get it."

The child seemed very much interested in the explanation, and then observed innocently:

"Uncle, did it ever occur to you that a peacock couldn't lay an egg?"

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**

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1. ACCIDENT INSURANCE—Collision.—The term "collision," in a contract of marine insurance, does not embrace the striking of a sunken or floating substance.—*Cline v. Western Assur. Co., Va.*, 44 S. E. Rep. 700.

2. ACCIDENT INSURANCE—Injuries Due to Fighting.—Forebly resisting assault of trespasser held not, as matter of law, to deprive insured of all benefit under a policy stipulating that it did not cover injuries resulting from fighting, etc.—*Coles v. New York Casualty Co.*, 83 N. Y. Supp. 1003.

3. ACCIDENT INSURANCE—Legal Expenses.—Employers' liability insurer held not liable for expenses of successfully defended negligence suit brought against insured.—*Cornell v. Travelers' Ins. Co.*, N. Y., 67 N. E. Rep. 578.

4. ACCIDENT POLICY—Loss of Arm.—The loss of an arm just below the elbow held to be the "loss of the arm," within the meaning of an accident policy.—*Garcelon v. Commercial Travelers' Eastern Acc. Ass'n, Mass.*, 67 N. E. Rep. 868.

5. ACCORD AND SATISFACTION—What Constitutes.—The mere payment of a debtor of an amount denominated a balance upon an account rendered, and its retention, held not an accord and satisfaction.—*Harrison v. Henderson, Kan.*, 72 Pac. Rep. 875.

6. ACCOUNT STATED—What Constitutes.—The furnishing by one party to another of a statement of account, without a view to settling the claim, held not to raise a presumption of an account stated.—*Harrison v. Henderson, Kan.*, 72 Pac. Rep. 878.

7. ACTION—Ex Delicto or Ex Contractu.—Where one has converted the personality of another, the injured party may, at his option, waive the tort, and sue the tortfeasor as a purchaser.—*Hirsch v. C. W. Leatherbee Lumber Co., N. J.*, 55 Atl. Rep. 645.

8. ACTION—Mechanic's Lien.—In an ordinary action commenced by summons, plaintiff, to recover, must show that his right of action was complete when the action was commenced.—*Titus v. Gunn, N. J.*, 55 Atl. Rep. 735.

9. ADJOINING LANDOWNERS—Raising Grade.—Where plaintiff's fence is built an inch within his line, defendant, the adjoining owner, may not, in raising the grade of his lot, pile dirt on such inch of land.—*Berry v. Fleming, 83 N. Y. Supp.* 1066.

10. ADVERSE POSSESSION—Sheriff's Sale.—Color of title to land purchased at a sheriff's sale held to arise on the execution of the sheriff's certificate, and not on the ex-

ecution of the sheriff's deed pursuant thereto.—*Philadelphia Mortgage Co. v. Palmer, Wash.*, 73 Pac. Rep. 501.

11. ADVERSE POSSESSION—Successive Grants.—Where the state made three successive grants of the same lands, and those claiming under the grantee in the third grant had been in possession for seven years, they acquired an absolute title, under Act 1819, ch. 28, § 1.—*Earnest v. Little River Land & Lumber Co., Tenn.*, 75 S. W. Rep. 1122.

12. APPEAL AND ERROR—Defect in Instruction.—An appellant is not entitled to a reversal because of a defect in the instructions, where he did not himself offer any instructions on such point.—*Harris v. Southern Ry. Co., Ky.*, 76 S. W. Rep. 151.

13. APPEAL AND ERROR—Immaterial Matters.—Error cannot be predicated on the exclusion of immaterial matters from the jury.—*Brown v. Silver, Neb.*, 96 N. W. Rep. 281.

14. APPEAL AND ERROR—Improper Evidence.—Where appellant's liability is established so conclusively as to make a new trial unavailing, the admission of improper evidence is not ground for reversal.—*Dyer v. Union R. Co., R. I.*, 55 Atl. Rep. 688.

15. APPEAL AND ERROR—Motion for Nonsuit.—The ruling on a motion for a nonsuit presents a question of law, and must be both excepted to and specified as an error of law occurring at the trial.—*Hanna v. De Garmo, Cal.*, 73 Pac. Rep. 830.

16. APPEAL AND ERROR—New Trial.—An objection that a court failed to find on a particular issue held not reviewable on appeal from an order denying a new trial, where such objection was not urged as a ground for the motion.—*Kaiser v. Dalto, Cal.*, 73 Pac. Rep. 828.

17. APPEAL AND ERROR—New Trial.—The opinion of the trial court granting a new trial will be considered on appeal with the statement for the purpose of determining questions which will be material on the new trial.—*Schnittger v. Rose, Cal.*, 73 Pac. Rep. 449.

18. APPEAL AND ERROR—Notice of Appeal.—A notice of appeal held not an original process, and hence not objectionable in that it referred to all of the defendants except one by the abbreviation *et al.* — *Philadelphia Mortgage & Trust Co. v. Palmer, Wash.*, 73 Pac. Rep. 501.

19. APPEAL AND ERROR—Who May Except.—A party to an action cannot except to the judgment therein rendered, unless he is, either as an individual or in a representative capacity, aggrieved thereby.—*Lamar v. Lamar, Ga.*, 45 S. E. Rep. 498.

20. ASSAULT AND BATTERY—Evidence.—A verdict for plaintiff, supported by his own evidence alone as to an assault, will not be disturbed because defendant's denial was corroborated by three witnesses.—*Zwanziger v. Newman, 83 N. Y. Supp.* 1071.

21. BANKRUPTCY—Assignment.—An assignee for the benefit of creditors held not precluded from suing to bring a prior conveyance by the insolvent into the trust fund, under Ky. St. 1899, §§ 84, 1910, 1911, because of existence of national bankruptcy act at the time of the conveyance by the insolvent and assignment for the benefit of creditors.—*Downer v. Porter, Ky.*, 76 S. W. Rep. 135.

22. BANKS AND BANKING—Indorsement.—An indorsement of a check by a bank held to have conveyed no representation that the indorsing bank claimed to be the owner of the paper.—*Crocker-Woolworth Nat. Bank v. Nevada Bank, Cal.*, 73 Pac. Rep. 456.

23. BANKS AND BANKING—Unaccepted Check.—The holder of an unaccepted check may sue thereon in his own name.—*Bloom v. Winthrop State Bank, Iowa*, 96 N. W. Rep. 738.

24. BIGAMY—Delirium Tremens.—In a prosecution for bigamy, evidence that defendant had delirium tremens during the week in which the first marriage was contracted was inadmissible.—*Barber v. People, Ill.*, 68 N. E. Rep. 93.

25. BILLS AND NOTES—Partnership.—Where a retiring partner assigned a firm note to the remaining partner on dissolution by parol, he was a necessary party to the action thereon by the assignee.—*Crews v. Yo'vell, Ky.*, 76 S. W. Rep. 127.

26. **BOUNDARIES**—Acquiescence.—A line established by monuments and acquiesced in by the parties for several years cannot be overthrown by a survey based on courses and distances.—*Kaiser v. Dalto*, Cal., 75 Pac. Rep. 828.

27. **BOUNDARIES**—General Reputation.—In a suit to determine a boundary, a witness may state that an old stake pointed out to him by defendant was generally reputed to be the corner of the survey in dispute.—*Matthews v. Thatcher*, Tex., 76 S. W. Rep. 61.

28. **BREACH OF MARRIAGE PROMISE**—Limitations.—Limitations run against an action for breach of promise from the time of the breach, not from the time of the contract.—*Buelna v. Ryan*, Cal., 73 Pac. Rep. 466.

29. **BREACH OF MARRIAGE PROMISE**—Right to Rescind.—Where one of the parties to a marriage contracts fails to perform his agreement at the time fixed, no reasonable excuse existing, the other party may rescind the contract and sue for damages.—*Waneck v. Kratky*, Neb., 96 N. W. Rep. 651.

30. **BRIDGES**—Repairs by County.—It is negligence for the supervisors of a county to fail to inspect a bridge under their control, where its floor timbers have not been renewed for 55 years.—*Smith v. Muncy Creek Tp.*, Pa., 55 Atl. Rep. 767.

31. **BURGLARY**—Possession of Stolen Goods.—As recent possession of the stolen goods is evidence that the possessor committed the larceny, it is also evidence, in case the larceny was committed by one who broke and entered a house, that the possessor broke and entered the house.—*State v. Hullen*, N. Car., 45 S. E. Rep. 513.

32. **CARRIERS**—Contributory Negligence.—Where the custodian of a lunatic was permitted to ride with her in a baggage car, and was injured by a sudden lurch of the train, that he was riding in such car held not contributory negligence.—*Chesapeake & O. Ry. Co. v. Jordan*, Ky., 76 S. W. Rep. 145.

33. **CHATTEL MORTGAGES**—Compensation.—Where the compensation to be allowed on officer is fixed by law, the allowance of the claim by county commissioners is formal only.—*Mitchell v. Clay County*, Neb., 96 N. W. Rep. 672.

34. **CONSTITUTIONAL LAW**—Bill of Rights.—The guaranty in the bill of rights that every person shall have a remedy for every injury is not a guaranty of a remedy for every species of injury.—*Goddard v. City of Lincoln*, Neb., 96 N. W. Rep. 273.

35. **CONSTITUTIONAL LAW**—Probate.—Civ. Code, § 3258, giving adults or minors seven years after probate in common form in which to call for probate in solemn form, is not unconstitutional, as not due process of law.—*Sutton v. Hancock*, Ga., 45 S. E. Rep. 504.

36. **CONTEMPT**—Newspapers.—A newspaper publisher, who published an article attacking the supreme court, held guilty of criminal contempt.—*State v. Shepherd*, Mo., 76 S. W. Rep. 79.

37. **CONTRACTS**—Consideration.—Where a petition to avoid an instrument as executed without consideration shows plaintiff received stock in a corporation organized pursuant thereto, a demurrer to it is properly sustained.—*Parker v. Allen*, Tex., 76 S. W. Rep. 74.

38. **CONTRACTS**—Variance.—There is no variance between an allegation on a verbal contract and an unsigned memorandum of such contract made by the party charged when the contract was entered into.—*Brown v. Silver*, Neb., 96 N. W. Rep. 281.

39. **CORPORATIONS**—Compliance With State Laws.—The provision that a foreign corporation, not having complied with the laws of the state, cannot sue therein, has no extraterritorial operation.—*Allegheny Co. v. Allen*, N. J., 55 Atl. Rep. 724.

40. **CORPORATIONS**—Validity of Contract.—To constitute a bar to an action on a contract by a foreign corporation, by setting up a penal statute rendering such contract invalid in the state where it was made, there

must be a precise averment of facts bringing the case within the statute.—*Allegheny Co. v. Allen*, N. J., 55 Atl. Rep. 724.

41. **COVENANTS**—Obligation to Perform.—A purchaser of a railroad's property held charged with performance of a covenant of its grantor contained in a deed to a part of its right of way.—*Chicago, St. L. & N. O. R. Co. v. Wilson*, Ky., 76 S. W. Rep. 138.

42. **CREDITORS' SUIT**—Execution Nulla Bona.—Return of a sheriff upon an execution *nulla bona* held a sufficient basis for the maintenance of a creditor's bill.—*Coffield v. Parmenter*, Neb., 96 N. W. Rep. 283.

43. **CRIMINAL EVIDENCE**—Defendant's Character.—It was error to refuse to permit a witness to state what defendant's character was prior to the assault complained of.—*State v. Cather*, Iowa, 96 N. W. Rep. 722.

44. **CRIMINAL EVIDENCE**—Failure to Swear Witness.—The omission to swear a witness for the prosecution before receiving his testimony may be urged by accused as ground for new trial.—*Langford v. United States*, Ind. T., 76 S. W. Rep. 111.

45. **CUSTOMS AND USAGES**—Safe Place to Work.—In an action by a servant for injuries, evidence of custom on question whether it was the duty of master or servant to inspect place of work held not to vary any rule of law or contract relation.—*Thayer v. Smoky Hollow Coal Co.*, Iowa, 96 N. W. Rep. 718.

46. **DAMAGES**—Irrigation Ditch.—In an action for injuries to crops from the alleged overflow of an irrigation ditch, an instruction as to the measure of damages held proper.—*Catlin Consol. Canal Co. v. Euster*, Colo., 73 Pac. Rep. 840.

47. **DAMAGES**—Value of Cow.—In an action against a railroad for the killing of plaintiff's cows, what plaintiff had been offered for the cows was not conclusive as to their value.—*Taylor v. Spokane Falls & Northern Ry. Co.*, Wash., 73 Pac. Rep. 499.

48. **DEEDS**—Establishment.—Where, in an action to establish a lost deed, the grantee relied on the money consideration expressed therein only, evidence as to another consideration was properly excluded.—*Kenniff v. Caulfield*, Cal., 73 Pac. Rep. 803.

49. **DEEDS**—Undue Influence.—A bill to set aside certain conveyances on the ground of undue influence and mental incapacity was not demurrable on the ground that it is impossible to ascertain therefrom on which plaintiff would rely to establish her cause of action.—*Murphy v. Crowley*, Cal., 73 Pac. Rep. 820.

50. **DEPOSITORIES**—Trust Fund.—A depository of a trust fund is held bound to restore the fund to the true owner on demand, although such deposit was made by an agent or trustee.—*Union Stockyards Nat. Bank v. Campbell*, Neb., 96 N. W. Rep. 608.

51. **DIVORCE**—Property Rights.—After divorce the husband has no right of possession in the separate property of the wife, occupied as a homestead while the marriage relation existed.—*Cizek v. Cizek*, Neb., 96 N. W. Rep. 657.

52. **DOWER**—Agreement With Heirs.—Where a widow entered into an agreement with one of the heirs, whereby she was to remain in possession and collect rents of the property, a demand for dower on her part was unnecessary.—*Potter v. Clapp*, Ill., 68 N. E. Rep. 81.

53. **ELECTIONS**—Contest.—Where an election contest has been dismissed, the court has no authority to set the dismissal aside without notice to the contestant.—*Moore v. Waddington*, Neb., 96 N. W. Rep. 279.

54. **ELECTRICITY**—Personal Injuries.—A telephone company and an electric light company held jointly liable for personal injuries received by plaintiff, and the two were properly joined in suit therefor.—*Economy Light & Power Co. v. Hiller*, Ill., 68 N. E. Rep. 72.

55. **EMINENT DOMAIN**—Additional Servitude.—The maintenance of an electric railway along a highway held not an additional servitude on the highway, entitling an abutting landowner to compensation.—*Georgetown & L. Traction Co. v. Mulholland*, Ky., 76 S. W. Rep. 148.

56. **EMINENT DOMAIN**—Condemnation Proceedings.—An appeal by a mortgagee in condemnation proceedings is not effective as to the land owner against whom no summons has been issued.—*Omaha Bridge & Terminal Ry. Co. v. Reed*, Neb., 96 N. W. Rep. 276.

57. **EMINENT DOMAIN**—Elevated Railroad.—An abutting property owner held entitled to recover damages sustained by the construction of an elevated railroad in a street, the fee of which was in the city, though such railroad did not constitute an additional servitude.—*Albers v. Union Elevated R. Co.*, Ill., 68 N. E. Rep. 35.

58. **EVIDENCE**—Boundaries. In a suit to determine boundary, surveyors, in detailing the result of experimental surveys by way of introduction, may state that theendant pointed out the beginning corners, and identified them as corners claimed by him.—*Matthews v. Thatcher*, Tex., 76 S. W. Rep. 61.

59. **EVIDENCE**—Contents of Letter.—Where the recipient of a letter is a nonresident, and died before the trial, secondary evidence of its contents is admissible.—*Hirsch v. C. W. Leatherbee Lumber Co.*, N. J., 55 Atl. Rep. 645.

60. **EVIDENCE**—Deposition.—A deposition is not conclusive against the party taking it as to statements made against his interest.—*Von Tobel v. Stetson & Post Mill Co.*, Wash., 73 Pac. Rep. 788.

61. **EVIDENCE**—Memorandum.—A physician who made an examination having testified fully in regard to it, and not being impeached, his memorandum thereof is not admissible.—*Zwanziger v. Newman*, 83 N. Y. Supp. 1071.

62. **EVIDENCE**—Proof of Claims.—Declarations in his own favor, made by a decedent in his will, are not admissible in favor of his estate against a party filing a claim against it.—*Bennett's Estate v. Taylor*, Neb., 96 N. W. Rep. 669.

63. **EXECUTION**—Judicial Sale.—A purchaser of land at judicial sale to be held for the owner as against the price and advances held entitled to interest on advances to pay mortgages necessary to prevent foreclosure.—*Natter v. Turner*, N. J., 55 Atl. Rep. 650.

64. **EXECUTION**—Reversal of Judgment.—Where a judgment creditor purchases at execution sale, and the judgment is reversed, he must restore the property so purchased on demand of the judgment debtor or his privies.—*Nelson v. City of Beatrice*, Neb., 96 N. W. Rep. 288.

65. **EXECUTORS AND ADMINISTRATORS**—Action on Bond.—Where two executors give a joint and several bond, action may be had thereon against one of them and the sureties for the benefit of the other, who is also a legatee.—*Municipal Court v. Whaler*, R. I., 50 Atl. Rep. 750.

66. **EXECUTORS AND ADMINISTRATORS**—Continuing Business.—Where an executor is directed to continue for a given period a certain business, he has no statutory right to commissions on the receipts and disbursements in the business.—*Lamar v. Lamar*, Ga., 45 S. E. Rep. 498.

67. **EXECUTORS AND ADMINISTRATORS**—Mortgage.—Beneficiaries of a life policy, allowing the proceeds to be applied on a mortgage on decedent's realty, held creditors of the decedent to the amount of such payment.—*Johnston v. Cutchin*, N. Car., 45 S. E. Rep. 522.

68. **EXEMPTIONS**—Partition Sale.—Proceeds of a partition sale of real estate cannot be claimed as exempt personal property against one who had taken proper steps to enforce a judgment lien against the land partitioned.—*First Nat. Bank v. Snyder*, Neb., 96 N. W. Rep. 285.

69. **FORGERY**—Instruction.—On a prosecution for forgery, an instruction that, if defendant stated to the person to whom he passed it that the drawer did not sign it, he should be acquitted, held, under the evidence, misleading.—*People v. Walker*, Cal., 73 Pac. Rep. 831.

70. **FRAUD**—Intention.—If an intention to not perform is shown to have existed at the time a promise was made, the promise is fraudulent.—*Pollard v. McKenney*, Neb., 96 N. W. Rep. 673.

71. **GAME**—Owner of Land.—One not the owner of land, who has a right to shoot game, fish thereon, etc., such right not being enjoyed by reason of his holding any other estate, and not having been granted in favor of any dominant tenement, has not a mere easement, but an interest in the soil.—*Layne v. Sheets*, Vt., 55 Atl. Rep. 656.

72. **HABEAS CORPUS**—Defective *Mittimus*.—A prisoner is not entitled to a release because of a defective *mittimus*, but a good *mittimus* may be substituted even after *habeas corpus*.—*In re Rogers*, Vt., 55 Atl. Rep. 661.

73. **HIGHWAYS**—Nonuser.—A highway does not cease to be such, from nonuser, till discontinued by the proper authorities.—*Knowles v. Knowles*, R. I., 55 Atl. Rep. 755.

74. **HUSBAND AND WIFE**—Administrator.—An agreement to act formally as administrator for a fixed compensation, for the purpose merely of clearing the title to the estate, held valid.—*In re Field's Estate*, Wash., 73 Pac. Rep. 768.

75. **HUSBAND AND WIFE**—Consideration.—A contract by a married woman, taking up a note on which she is an accommodation indorser, to release a prior indorser, is binding, though the consideration passed to a third person.—*Headley v. Leavitt*, N. J., 55 Atl. Rep. 731.

76. **HUSBAND AND WIFE**—Joint Note.—A husband held not liable on a note given for a joint debt after his wife's death as survivor of the community.—*Bank of Montreal v. Buchanan*, Wash., 73 Pac. Rep. 482.

77. **INDICTMENT AND INFORMATION**—Variance.—Where an offense is alleged to have been committed on a day certain, the variance is immaterial, if it be shown to have been committed on another day at or about the same time.—*People v. Shannon*, 83 N. Y. Supp. 1061.

78. **INJUNCTION**—Trade Secret.—Those who induce another, under a contract not to disclose a trade secret, to disclose it, will be enjoined from making any use of the information so obtained.—*Stone v. Goss*, N. J., 55 Atl. Rep. 736.

79. **JUDGMENT**—Non-Suit.—Where an order of nonsuit as to certain defendants, leaving others still before the court, is granted, the court may in its final judgment include a judgment of nonsuit as to such defendants.—*Hanna v. DeGiarmo*, Cal., 73 Pac. Rep. 830.

80. **JUDGMENT**—*Res Judicata*.—A judgment in a former action for the recovery of premises held not *res judicata* on the question of fraud in a subsequent action to set aside a conveyance of the premises as fraudulent.—*Budlong v. Budlong*, Wash., 73 Pac. Rep. 783.

81. **JUDGMENT**—*Res Judicata*.—A judgment on a question directly involved in one suit is conclusive in another suit between the same parties.—*Schlemme v. Omaha Gas Mfg. Co.*, Neb., 96 N. W. Rep. 644.

82. **JUDGMENT**—*Res Judicata*.—A judgment of dismissal, based on the insufficiency of the complaint, held not *res judicata* in an action founded on the same cause of action.—*Von Tobel v. Stetson & Post Mill Co.*, Wash., 73 Pac. Rep. 788.

83. **JUDICIAL SALES**—Setting Aside.—Testimony that the valuation of real property offered at judicial sale was fixed too low will not avail to set aside the appraisal or a sale thereunder.—*David Adler & Sons Clothing Co. v. Hellman*, Neb., 95 N. W. Rep. 467.

84. **JUSTICES OF THE PEACE**—Deed to Real Estate.—Reply in for a deed will not be dismissed, as involving title to real estate, and therefore without the jurisdiction of a justice of the peace, where the deed was deposited on bailment *deposuit*.—*Pasterfield v. Sawyer*, N. Car., 45 S. E. Rep. 524.

85. **LANDLORD AND TENANT**—Breach of Covenant.—The breach of a landlord's covenant to make improvements after the tenant takes possession is not a defense to his action of unlawful entry and detainer for nonpayment of rent.—*Mallick v. Kellogg*, Wis., 95 N. W. Rep. 372.

86. **LANDLORD AND TENANT**—Lien on Crops.—In foreclosing a lien on crops, the court properly refused to retain more of the crops than necessary to discharge the

amount due.—*Momrich v. Schwartz*, Neb., 96 N. W. Rep. 636.

87. **LANDLORD AND TENANT**—Nature of Estate.—A lease of agricultural lands for the full term of 40 years, or during the natural life of the lessees, held to convey a life estate.—*Wegner v. Lubenow*, N. Dak., 95 N. W. Rep. 442.

88. **LIFE INSURANCE**—Beneficiary.—Heir at law of holder of death benefit certificate held not entitled to question the designation of beneficiary by the deceased.—*Schoales v. Order of Sparta*, Pa., 55 Atl. Rep. 766.

89. **LIFE INSURANCE**—Limitations.—The statute of limitations begins to run against a claim for contributions by one of the beneficiaries of a life policy only from the death of insured.—*Stockwell v. Mutual Life Ins. Co.*, Cal., 73 Pac. Rep. 833.

90. **LIFE INSURANCE**—Waiver.—A party cannot allege full compliance with conditions of a policy, and on the trial prove that, while the conditions were not complied with, they had been waived.—*German Ins. Co. v. Shader*, Neb., 96 N. W. Rep. 604.

91. **LIMITATION OF ACTIONS**—Action to Set Aside Property.—A bill to set aside certain deeds for fraud and undue influence, and to recover possession of certain land, and for an accounting, held an action to recover real property, within Code Civ. Proc. § 318.—*Murphy v. Crowley*, Cal., 73 Pac. Rep. 820.

92. **LIMITATION OF LAWS**—Conflict of Laws.—Where a general limitation law conflicts with a law applicable only to a particular class, the latter controls.—*Sutton v. Hancock*, Ga., 45 S. E. Rep. 504.

93. **LIMITATION OF ACTIONS**—Presentation of Instrument.—Limitations begin to run against an instrument payable at a certain time and place on presentation at maturity, though there is no presentation.—*Wurth v. City of Paducah*, Ky., 76 S. W. Rep. 143.

94. **LIVERY STABLE KEEPERS**—Viscious Horse.—A hirer of a livery rig held not guilty of contributory negligence in failing to abandon the horse and walk back to town on the first symptoms of viciousness being displayed by the animal.—*Nisbet v. Wells*, Ky., 76 S. W. Rep. 120.

95. **MALICIOUS PROSECUTION**—Finding of Insanity.—A finding by commissioners of insanity that a person brought before them is insane is *prima facie* evidence of probable cause for the proceeding.—*Figg v. Hanger*, Neb., 96 N. W. Rep. 638.

96. **MINES AND MINERALS**—Discovery of Lode.—The location of a mining claim is of no validity until a discovery of ore is made within the lines of such claim and outside of the lines of any other valid existing lode location.—*McPherson v. Julius*, S. Dak., 95 N. W. Rep. 428.

97. **MORTGAGES**—Authority to Sell.—In an action at law involving legal title based on deed of trustee under a deed of trust, held, that no question could arise as to whether the conditions on which the trustee had been authorized to sell had been actually complied with.—*Mersfelder v. Spring*, Cal., 73 Pac. Rep. 452.

98. **MORTGAGES**—Delivery of Deed.—The recording of a mortgage four minutes prior to the deed to the mortgagor held not to warrant the conclusion that deed was not delivered first.—*Wheeler v. Young*, Conn., 55 Atl. Rep. 670.

99. **MUNICIPAL CORPORATIONS**—Defective Streets.—One complaining of an omission of a city to keep the streets in proper repair will not be heard to complain of the qualification requiring notice of the defects to be given the city.—*Goddard v. City of Lincoln*, Neb., 96 N. W. Rep. 273.

100. **MUNICIPAL CORPORATIONS**—Limitations.—The levying and collection of a tax by a city to pay its bonds does not make the taxes a trust fund for payment of the bonds, suit on which is barred by limitations.—*Wurth v. City of Paducah*, Ky., 76 S. W. Rep. 143.

101. **NOTARIES**—Use of Railroad Pass.—Notary public accepting and using a free pass from a sleeping car com-

pany, is subject to removal for violation of Const. art. 13, § 5.—*People v. Wadhams*, N. Y., 68 N. E. Rep. 65.

102. **OFFICERS**—Quasi-Judicial.—When the law commits to any officer the duty of looking into facts and acting upon them, his discretion is quasi-judicial.—*Mitchell v. Clay County*, Neb., 96 N. W. Rep. 673.

103. **PARENT AND CHILD**—Emancipation.—There can be no recovery for services of a child placed by her mother with others to live as their child, though excessive work is required.—*Blivin v. Wheeler*, R. I., 55 Atl. Rep. 760.

104. **PARTNERSHIP**—Deposit in Bank.—The fact that a firm deposit stands in the individual name of a partner of the firm shows at most that he has legal title thereto, and is not conclusive evidence that the firm had no interest therein.—*Gansevoort Bank v. Carragan*, N. J., 55 Atl. Rep. 741.

105. **PARTNERSHIP**—Assignment.—Where a partner conveys partnership property, and the assignment is concurred in by the other member of the firm, the assignee will have a superior right to the property over one whose claim is based on a subsequent assignment.—*Ulrich v. McConaughy*, Neb., 96 N. W. Rep. 645.

106. **PARTNERSHIP**—Dissolution.—In an action for breach of a retiring partner's contract not to engage in the same business in the same city, failure of the court to refer to an exception in the contract was not error; there being no contention that the breach was within the exception.—*Downs v. Woodson*, Ky., 76 S. W. Rep. 152.

107. **PARTNERSHIP**—Holding Oneself Out.—If one holds himself out as a partner, and credit is given the partnership on the faith thereof, such person is liable.—*Fennell v. Myers*, Ky., 76 S. W. Rep. 136.

108. **PLEDGES**—Bills and Notes.—A pledgee of a note held entitled to sue and collect the same, and to use the name of the pledgor for that purpose.—*Crews v. Yowell*, Ky., 76 S. W. Rep. 127.

109. **PRINCIPAL AND AGENT**—Bank Cashier.—Bank cashier held not individually liable for bank's refusal to arrange for application of proceeds of purchase by cashier from bank debtor to indebtedness in certain manner.—*Pease v. Francis*, R. I., 55 Atl. Rep. 686.

110. **PRINCIPAL AND AGENT**—Indemnity Bond.—Whenever a duty arises to disclose facts to one about to become surety for an agent, it is only as to facts affecting the risk in respect to the subject-matter of the agency that the duty arises.—*Etna Indemnity Co. v. Schroeder*, N. Dak., 95 N. W. Rep. 436.

111. **PRINCIPAL AND AGENT**—Notice to Agent.—The knowledge of an agent will not be imputed to his principal, when the agent is a nominal agent merely, or is acting as to ministerial matters merely, or his interests are adverse to principal.—*Etna Indemnity Co. v. Schroeder*, N. Dak., 95 N. W. Rep. 436.

112. **PROHIBITION**—Entry of Judgment.—Where a petitioner's contention that certain findings and judgment thereon were erroneous raised error of law only, reviewable on appeal, a writ of prohibition would not be granted to restrain the entry of the judgment.—*State v. Superior Court of King County*, Wash., 73 Pac. Rep. 479.

113. **RAILROADS**—Trespasser.—Where the engineer and fireman of a train invite a boy to go on the tender and shovel coal, the liability of the road for injuries sustained by the boy in alighting from the train stated.—*Harris v. Southern Ry. Co.*, Ky., 76 S. W. Rep. 151.

114. **RELIGIOUS SOCIETIES**—Ecclesiastical Organization.—Where a church has been endowed in connection with some ecclesiastical organization and form of church government, it cannot unite with some other organization or become independent.—*Dochkus v. Lithuanian Ben. Soc. of St. Anthony*, Pa., 55 Atl. Rep. 779.

115. **REPLEVIN**—Cancellation of Contracts.—Replevin is not a chancery proceeding, which can be invoked for the cancellation of a contract.—*Penton v. Hansen*, Okla., 73 Pac. Rep. 943.

116. **SALES—Action for Price.**—That, when defendant bought a harvester, he had about 30 acres of grain unharvested, and that he used it to cut the same, did not constitute a using of it through the harvesting season.—*McCormick Harvesting Mach. Co. v. Machmuller, Neb.*, 95 N. W. Rep. 507.

117. **SALES—Cash on Delivery.**—Where goods are sold to be paid for on delivery, the payment is a condition precedent to passing title unless such payment is waived at the time or subsequent to the delivery of the goods.—*Paulson v. Lyon, Utah*, 73 Pac. Rep. 510.

118. **SALES—Recording of Conditional Sales.**—The Georgia statute, providing that conditional sales not recorded are valid between the parties, does not apply to a sale on condition of payment in cash on delivery.—*Hirsh v. C. W. Leatherbee Lumber Co., N. J.*, 55 Atl. Rep. 645.

119. **SCHOOLS AND SCHOOL DISTRICTS—Dances.**—Use of schoolhouse for dances held a misappropriation of trust property and opposed to principle that sovereignty cannot tax for private purposes.—*Lewis v. Bateman, Utah*, 73 Pac. Rep. 509.

120. **STREET RAILROADS—Personal Injuries.**—In an action for injuries by collision with a street car, held error not to charge that defendant could relieve itself of the statutory presumption by showing that neither party was to blame.—*Atlanta Ry. & Power Co. v. Gaston, Ga.*, 45 S. E. Rep. 508.

121. **SUBROGATION—Paying off Incumbrance.**—Where a co-tenant pays off an incumbrance with intent to have it completely extinguished, no right of subrogation remains.—*Kinkad v. Ryan, N. J.*, 55 Atl. Rep. 730.

122. **TAXATION—Railroad Property.**—The words "railroad" and "railway," as used in the statutes of Pennsylvania, are synonymous, and apply to both steam and street railways, unless the context clearly shows a different intent.—*City of Philadelphia v. Philadelphia Traction Co., Pa.*, 55 Atl. Rep. 762.

123. **TENANCY IN COMMON—Salary.**—One of joint tenants in common of a tugboat, acting as a managing owner, held not entitled to salary for his services as such.—*Croasdale v. Von Boyneburgk, Pa.*, 55 Atl. Rep. 770.

124. **TRADEMARKS AND TRADENAMES—Use of English Word.**—A manufacturer has no such exclusive proprietary right to the use of a common English word as entitles him to debar all others from use of the same as a trademark, in the absence of fraud or intent to deceive.—*Barrett Chemical Co. v. Stern, N. Y.*, 68 N. E. Rep. 65.

125. **TRADEMARKS AND TRADENAMES—Use of Name.**—A person has the right honestly to use his own name in connection with his business, even though such use may injure the business of another; but he will not be permitted to intentionally so use it as to obtain the trade which legitimately belongs to an older competitor.—*Royal Baking Powder Co. v. Royal, U. S. C. C. of App.*, Sixth Circuit, 122 Fed. Rep. 337.

126. **TRESPASS TO TRY TITLE—School Lands.**—A purchaser of school lands cannot maintain trespass to try title to recover such lands, without showing that the lands had been classified and appraised.—*Corrigan v. Fitzsimmons, Tex.*, 76 S. W. Rep. 65.

127. **TRIAL—Boundaries.**—In a suit to determine a boundary, counsel's reference to a supreme court decision in another case, containing a statement with reference to ripping up old land titles, held improper.—*Matthews v. Thatcher, Tex.*, 76 S. W. Rep. 61.

128. **TRIAL—Deposition.**—Where a party offered a deposition taken by an adversary, it was not error to refuse to permit the cross-examination to be submitted before the direct examination.—*Von Tobel v. Stetson & Post Mill Co., Wash.*, 73 Pac. Rep. 758.

129. **TRIAL—Jury.**—In an action against a railroad for injuries to person on track, refusal to grant new trial on ground that one of plaintiff's witnesses improperly addressed jury held not error.—*Chicago Junction Ry. Co. v. McGrath, Ill.*, 68 N. E. Rep. 69.

130. **TRUSTS—Expenses of Repairs.**—Under a will directing the payment of taxes, repairs, and insurance on a dwelling, to be occupied by testator's daughter for life, out of testator's estate, such charges held payable out of the income, and not from the corpus of the estate.—*In re Tracy*, 88 N. Y. Supp. 1049.

131. **TRUSTS—Spendthrift.**—Trustees, who had been vigilant in the administration of the trust, held not subject to removal by reason of the existence of mere strained relations between them and the *cestui que trust*.—*Anderson v. Kemper, Ky.*, 76 S. W. Rep. 122.

132. **VENDOR AND PURCHASER—Counterclaim.**—In an action by vendor for purchase price of land, release of a mortgage, filed by vendor on the trial, held sufficient to defeat counterclaim based on his failure to convey unincumbered title.—*Thurgood v. Spring, Cal.*, 73 Pac. Rep. 456.

133. **VENDOR AND PURCHASER—Offer and Acceptance.**—A letter making a counter offer for the purchase of land held to operate as a rejection of the vendor's former offer, which the vendee could not thereafter ripen into a contract by acceptance.—*Niles v. Hancock, Cal.*, 73 Pac. Rep. 840.

134. **WATERS AND WATER COURSES—Ownership of Ice.**—Title to ice forming on a mill pond is in the owners of the land, and not in the lessee of the mill and apparent water power.—*Abbott v. Cremer, Wis.*, 95 N. W. Rep. 387.

135. **WATERS AND WATER COURSES—Underground Streams.**—Known underground streams flowing in well defined channels are subject to appropriation.—*Whitmore v. Utah Fuel Co., Utah*, 73 Pac. Rep. 764.

136. **WILLS—Construction.**—Where no trust is created, neither the executor, nor the heirs or devisees, who claim only a legal title, can come into equity to obtain a construction of the will.—*Andersen v. Andersen, Neb.*, 96 N. W. Rep. 276.

137. **WILLS—Contests.**—Where contestants had filed a prior will for probate, giving notice of hearing, which had been regularly continued and was still pending, they were entitled to contest the subsequent will on the ground of want of capacity.—*In re Langley's Estate, Cal.*, 73 Pac. Rep. 824.

138. **WILLS—Probate, Solemn Form.**—A judgment admitting a will to record as proved in solemn form is conclusive upon all parties notified as to all questions raised, or which could not have been raised.—*Sutton v. Hancock, Ga.*, 45 S. E. Rep. 504.

139. **WITNESSES—Competency.**—In a prosecution for bigamy, the incompetency of defendant's lawful wife as a witness against him cannot be waived.—*Barber v. People, Ill.*, 68 N. E. Rep. 93.

140. **WITNESSES—Competency.**—A juror is not, by reason of his position, incompetent to testify in the cause in which he sits, under Civ. Code Proc. § 328.—*Chicago, R. I. & P. Ry. Co. v. Collier, Neb.*, 95 N. W. Rep. 472.

141. **WITNESSES—Cross-Examination.**—Rejection of a question to a witness, on cross-examination, whether his recollection was the same on all answers made by him as on a certain answer just made, is in the discretion of the court.—*Zwangizer v. Newman*, 83 N. Y. Supp. 1071.

142. **WITNESSES—Disorderly House.**—One prosecuted for keeping a disorderly house may properly be asked on cross-examination by the state, as affecting his credibility, whether he has not previously been convicted of the same offense.—*State v. Babcock, R. I.*, 55 Atl. Rep. 685.

143. **WITNESSES—Impeachment.**—A defendant, on trial for crime, on becoming a witness, may be impeached like other witnesses.—*People v. Walker, Cal.*, 73 Pac. Rep. 831.

144. **WITNESSES—Memorandum.**—It is error to allow a witness to use as a memorandum a document in the preparation of which he did not participate and concerning the accuracy of which he has no personal knowledge.—*Titus v. Gunn, N. J.*, 55 Atl. Rep. 735.